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No. 00-

IN THE

Supreme Court of the United States

LOCAL LODGE 2552, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT LODGE 74, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, and H & H CONSOLIDATED INC.,

Petitioners,

v.

FREDERICK A. PUSEY,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Virginia

PETITION FOR A WRIT OF CERTIORARI

THOMAS LUCAS
MCGUIRE, WOODS, BATTLE & BOOTHE
9000 World Trade Center
101 West Main Street
Norfolk, VA 23510

JEREMIAH A. COLLINS
Counsel of Record
MARGO PAVE
BREDHOFF & KAISER, P.L.L.C.
805 15th Street, N.W.
Suite 1000
Washington, D.C. 20005
(202) 842-2600

JAMES J. VERGARA, JR.
VERGARA & ASSOCIATES
100 Main Street Plaza
Hopewell, VA 23860

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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QUESTION PRESENTED

1. May a court declare a state regulatory statute to be enforceable on an enclave over which the state has ceded exclusive jurisdiction to the United States, on the ground that the cession of jurisdiction was conditioned on the enclave's being used for a purpose the court deems to be different from the use subsequently made of the enclave by the United States, where both the federal government and the state agency responsible for enforcement of the regulatory statute in question maintain that the United States retains exclusive jurisdiction, and the language conditioning the state's cession of jurisdiction is ambiguous?

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The orders of the Supreme Court of Virginia refusing Petitioners' petitions for appeal and denying Petitioners' petition for rehearing are unreported and are reprinted in the Appendix to this Petition at App. 1a, 2a and 18a. The opinion and order of the Circuit Court of Accomack County granting Respondent's motion for summary judgment with respect to the question presented here are unreported and are reprinted at App. 3a-11a and 12a-13a. The order of the Circuit Court granting Respondent's motion for summary judgment as to liability is unreported and is reprinted at App. 14a-17a. The order of the Circuit Court entering final judgment on behalf of Respondent is unreported and is reprinted at App. 19a-23a.

JURISDICTION

The Supreme Court of Virginia refused Petitioners' petitions for appeal on September 13, 2000, App. 1a and 2a, and denied a timely petition for rehearing on November 3, 2000, App. 18a. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

Article I, § 8, cl. 17 of the United States Constitution provides in pertinent part that "Congress shall have Power . . . to exercise exclusive Legislation . . . over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, Dock-Yards, and other needful Buildings."

STATEMENT OF THE CASE

1. In 1940, the Virginia General Assembly enacted a statute providing that, "for the purpose of enabling the United States of America to further the National Defense at Hampton

Roads Naval Operating Base, Norfolk, Virginia, and at or near the Naval Proving Ground, Dahlgren, Virginia, the Commonwealth hereby cedes to the United States of America exclusive jurisdiction" over land near those sites. Chapter 14, Act of Assembly 1940 (Ex. A)[1]. The statute further provided that "the jurisdiction hereby ceded shall continue no longer than the United States shall own such lands in fee simple and they shall be used and occupied by the United States for naval purposes." *Id.*

The United States Government thereupon began acquiring the specified land, which is situated in Accomack County, Virginia. Title to the first two parcels of land was acquired by the United States in 1942 (Exs. D2, E2), and title to a third parcel was acquired in 1944. (Ex. F2). The Secretary of the Navy accepted exclusive jurisdiction on behalf of the United States over the first two parcels in 1943 and over the third in 1949, by letters stating that the Navy was accepting jurisdiction "on behalf of the United States in the manner and form granted and ceded by an Act of the General Assembly of the Commonwealth of Virginia, approved February 7, 1940 (Chapter 14, Act of Assembly 1940)." (Exs. D3, E3, F3). Virginia's Governor acknowledged the United States' acceptance of jurisdiction by signature on each of the letters.[2]

2. Both Virginia and the United States understood that the "naval purposes" for which the land was to be used were aviation-related activities. The Virginia statute noted that the land as to which jurisdiction was being ceded was being "acquired for use as auxiliary air fields." Ch. 14, Act of

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[1] We cite to the Joint Stipulated Exhibits filed in the Circuit Court of Accomack County as "Ex. _____."

[2] Title to a fourth parcel adjacent to the first three was acquired by the United States in 1952. (Ex. G2). The parties have not located any documents indicating that the United States formally acquired exclusive jurisdiction over this parcel. The jurisdictional status of the fourth parcel need not be determined in resolving the question presented in this case.

Assembly 1940. (Ex. A). The Navy built runways, aircraft hangars, an operations tower and other aviation-related facilities on the property, which the government named the Wallops Flight Facility ("WFF"). (Ex. C). The land is not adjacent to nor does it have access to any deep water; accordingly, there never was any contemplation that the land would be used for a naval port.

3. Since the time these lands first were acquired by the United States, title never has rested in any entity other than the United States, which continues to own the property in fee simple. In 1961, custody of the lands passed from one part of the United States government to another, when the Navy transferred custody to the National Aeronautics and Space Administration ("NASA"). (Ex. H3). NASA is an agency of the federal government, established pursuant to 42 U.S.C. § 2451.

When NASA took custody of WFF, the Fifth Naval District advised NASA by letter that the United States had exclusive jurisdiction over the three parcels of land. The letter included a map identifying the date upon which each parcel at WFF was acquired and the dates upon which exclusive jurisdiction was obtained. (Ex. C). The map reflects that the land was being used for aviation-related purposes at the time custody was transferred: it shows an airfield with multiple runways, fuel storage facilities, hangars, aircraft parking areas, and an operations tower.

Under NASA's stewardship, the property continued to be used by the federal government for aviation activities on behalf of the Navy and other branches of the armed forces. NASA administered thousands of rocket and satellite launches for the United States Navy, Army and Air Force between 1960 and 1988. Launches for the Navy alone totaled 2,583, while launches conducted for the benefit of the Army numbered 1,638, and for the Air Force, 574. (NASA

Response to FOIA Request # 1)[3]. While the actual launches were from a nearby island, not from the mainland sites at issue here, the facilities where the launches were administered and controlled were located on the land at issue, and most of the design and construction work for the launches occurred on that land.

In 1987, the Navy located the AEGIS Combat System Center at Wallops Island, expanding further the Navy's presence at WFF. (Ex. K).

4. The United States never has acted to relinquish its exclusive jurisdiction over these lands, although the Virginia Code sets forth a specific mechanism for doing so. Section 7.1-25.1 of the Virginia Code provides for notification to the Governor by the United States that the federal government "desires or is willing to relinquish to the Commonwealth" jurisdiction over Virginia lands. If such notice is given and accepted by the Governor, the notice of relinquishment is filed with the Secretary of the Commonwealth and entered in the deed book of the city or county in which the lands are located. The United States has utilized this simple notification procedure to relinquish exclusive jurisdiction over other lands in Virginia (Ex. V1), but has not done so with respect to the land at issue here.

In 1994, NASA notified the Virginia Attorney General that "NASA has concluded that the Federal Government, as represented by NASA, has exclusive Federal jurisdiction over parcels 1 through 3." (Ex. U1). The Virginia Department of Labor and Industry had come to the same conclusion in 1990, finding that the jurisdictional status of the lands "has not

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[3] The responses Petitioners received to their Freedom of Information Act ("FOIA") request concerning this matter were filed with the Circuit Court for Accomack County and were noted by that court in its second summary judgment order. App. 15a.

changed and that the Federal government retains exclusive jurisdiction over this land." (Exs. O, Q)[4].

5. Among the federal contractors working at WFF is Petitioner H&H Consolidated, Inc., whose employees are represented for collective bargaining purposes by Petitioners Local Lodge 2552 and District Lodge 74, International Association of Machinists and Aerospace Workers (collectively "IAM"). The collective bargaining agreement ("CBA") between H&H and IAM includes a provision that requires employees who do not choose to join IAM to pay an agency fee to cover the costs of collective bargaining representation. (Ex. T1).

Enforcement of agency fee agreements is permitted under federal law, 29 U.S.C. § 158(a)(3), *see Marquez v. Screen Actors Guild*, 525 U.S. 33 (1998), but is forbidden by Virginia's "right-to-work" law, Va. Code Ann. § 40.1-62. Petitioners negotiated and enforced the agency fee provision on the basis of their belief that the H&H worksite is under exclusive federal jurisdiction and therefore exempt from Virginia's "right-to-work" law. That belief was supported by

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[4] A Virginia Deputy Attorney General, on the other hand, concluded in 1994 that the United States had lost exclusive jurisdiction as of 1961, because "the land ceased to be controlled by the Navy, and the United States no longer occupies it for naval purposes." (Ex. U2). *See infra* note 8.

It has been the policy of the Virginia state police not to patrol the lands at WFF. (Ex. N5). Investigation of incidents occurring at WFF is the responsibility of the WFF security chief, a NASA employee, who investigates such incidents in conformance with the NASA security handbook. *Id.* The Accomack County Sheriff's Department does not enter WFF to serve process, but rather asks WFF security to bring individuals to the main gate, where service is effected. *Id.* The Commonwealth Attorney for Accomack County, who has held his position since 1985, never has prosecuted anyone for crimes occurring on WFF land, *id.*, but the United States Attorney's office has successfully brought charges under federal law for criminal acts on the property. (Exs. W2, W3).

both state and federal administrative decisions. As noted, the Virginia Department of Labor and Industry, the agency charged with enforcing the state's "right-to work" law, determined in 1990 that the federal government had exclusive jurisdiction over WFF and that the "right-to-work" law did not apply there. In an arbitration involving another federal contractor at WFF whose workers are represented by IAM under a contract containing an agency fee clause, the arbitrator similarly concluded that the United States maintained exclusive jurisdiction over WFF and that the agency fee clause therefore was binding. (Ex. S). And in this very matter, the National Labor Relations Board ("NLRB") dismissed an unfair labor practice charge brought against IAM for enforcing the agency fee clause, finding the clause permissible because WFF is a federal enclave subject to exclusive federal jurisdiction. (Ex. T6).

6. In 1995, Respondent Frederick Pusey, an H & H employee who had been discharged for refusing to pay the required agency fee, sued IAM and H&H in the Circuit Court of Accomack County, contending that enforcement of the agency fee clause violated Virginia's "right-to-work" law. The action was removed to the United States District Court for the Eastern District of Virginia, but that court remanded it back to the state court.

Notwithstanding the determinations by, *inter alia*, NASA, the NLRB, and the Virginia Department of Labor and Industry that the United States holds exclusive jurisdiction over the lands at issue, the Circuit Court for the County of Accomack ruled that jurisdiction had returned to Virginia some forty years ago. App. 10a, 12a-13a. Declaring that "[t]he question [to be decided] is . . . whether the exclusive jurisdiction of the United States in the three parcels reverted to the Commonwealth of Virginia for failure of the Navy to use and occupy the property for Naval purposes," App. 7a, the court held that such "reverter" occurred when the Navy transferred custody of the facility to NASA in 1961, at which

time "a flag belonging to NASA was raised [and] [a]ll Navy personnel departed," *id.* Asserting that "the central factual issue in this case [is] whether the property ceased to be used and occupied by the Navy," App. 10a, the court stated that, upon the transfer of custody to NASA, "the U.S. Navy . . . ceased to use and occupy the three parcels for Naval purposes," and "[t]herefore, concurrent jurisdiction reverted to the Commonwealth of Virginia," *id.* Although the court noted that, since 1987, the Navy again has had a continuous presence at WFF, the court declared that, once the Navy had transferred use of the property to NASA, "[t]here is no law that provides that exclusive Federal jurisdiction could spring up again at the much later time when the Navy again was permitted by NASA to use some of its property for some Naval purposes." *Id.*

The court deemed it immaterial that the United States had never surrendered its exclusive jurisdiction and that Virginia had not formally asserted jurisdiction over the land at issue, because "[t]he language in the [1940] Virginia Act of the cession of jurisdiction is similar to language, in real property law, of the possibility of reverter and not similar to the language of a right of entry for condition broken." App. 6a. Because a common law "possibility of reverter" (unlike a "right of entry for condition broken") results in "automatic" reverter when the specified conditions no longer exist, *id.*, the court declared that the United States automatically and permanently lost its exclusive jurisdiction over this land when the Navy transferred custody to NASA.

After granting partial summary judgment to Respondent Pusey on February 2, 1998 on the question of state jurisdiction, App. 12a-13a, the Circuit Court on November 17, 1999, granted him partial summary judgment as to liability and ordered a trial on damages. App. 14a-17a. Following trial, the court entered judgment in favor of Pusey in the amount of $135,000.00 with interest. App. 19a-23a.

The Supreme Court of Virginia refused Petitioners' petitions for appeal on September 13, 2000, App. 1a and 2a, and that Court denied Petitioners' timely petition for rehearing on November 3, 2000. App. 18a.

REASONS FOR GRANTING THE WRIT

Many federal enclaves are used today in ways that differ markedly from the particular uses that were anticipated decades ago when states initially ceded jurisdiction over such lands to the United States. This case presents an opportunity for the Court to determine whether, by "a rigid interpretation of antiquated deeds [or statutes] that failed fully to anticipate the complex development of [federal government] operations," *United States v. Johnson*, 994 F.2d 980, 986 (2d Cir. 1993), a state court may declare, contrary to the position of the relevant federal agencies (and here, contrary as well to the position of the relevant state regulatory agency) that a state regulatory statute has become enforceable against activities on a federal enclave merely because, in the state court's view, the activities conducted by the United States on the enclave do not sufficiently match those that were anticipated by the state statute that set out the basis on which the state was ceding jurisdiction.

In this case, the state court divested the United States of its exclusive jurisdiction over the Wallops Flight Facility, and subjected Petitioners to liability under a state labor law that NASA, the NLRB and the Virginia Department of Labor and Industry all consider to be inapplicable at WFF by virtue of exclusive federal jurisdiction. The state court did so on the ground that the 1940 Virginia statute ceding jurisdiction over this land to the United States stated that exclusive federal jurisdiction would continue only as long as the property was "used and occupied by the United States for naval purposes"—a phrase which the court construed as requiring that the facility be *occupied by*, and used *by* (rather than *for*) *the United States Navy* (rather than NASA). The court below

reached that result, which in no way is compelled by the statutory language, by approaching this case as if it involved a routine state-law dispute as to property rights, rather than a question of federal regulatory authority over an enclave that concededly is owned by the United States.

The decision below divesting the United States of its exclusive jurisdiction on this basis is contrary to the teaching of this Court's decision in *Humble Pipe Line Co. v. Waggonner*, 376 U.S. 366 (1964), and the decision below conflicts in principle with the Second Circuit's decision in *United States v. Johnson, supra*. Certiorari should be granted to correct this ill-considered judicial interference with exclusive federal jurisdiction at an important federal enclave, and to provide needed guidance to the lower courts respecting the analysis to be applied when it is claimed that the federal government's changing use of an enclave has triggered a loss of exclusive federal jurisdiction.

1. It long has been settled that the federal government has broad power to acquire land for governmental use with or without the consent of the state in which the property is situated, but such acquisition does not, without more, oust the state of jurisdiction to enforce its laws on the acquired property. *See Paul v. United States*, 371 U.S. 245, 264 (1963); *Silas Mason Co. v. Tax Comm'n*, 302 U.S. 186, 197 (1937); *James v. Dravo Contracting Co.*, 302 U.S. 134, 141, 147-149 (1937); *Fort Leavenworth R.R. Co. v. Lowe*, 114 U.S. 525, 530-531 (1885). The question whether, in addition to ownership, *jurisdiction to establish and enforce the law* in a federal enclave has been transferred from a state to the federal government is governed by the Enclave Clause of the Constitution, Art. I, § 8, cl. 17, which grants Congress the "Power . . . to exercise exclusive Legislation" over all property acquired "by the Consent of . . . the State in which the same shall be." *See Paul*, 371 U.S. at 264; *Silas Mason Co.*, 302 U.S. at 197; *Dravo Contracting Co.*, 302 U.S. at 147; *Fort Leavenworth R.R. Co.*, 114 U.S. at 531.

The Enclave Clause has been understood to require the consent of the state, either through a statute of cession or through some form of agreement, before the United States may assume legislative jurisdiction over land it has acquired. Where such consent has been given, state laws cease to operate in the federal enclave: "the grant of 'exclusive' legislative power to Congress over enclaves that meet the requirements of Art. 1, § 8, cl. 17, by its own weight, bars state regulation without specific congressional action." *Paul*, 371 U.S. at 263.

The accession of federal legislative authority over property under the Enclave Clause thus depends on the consent of the state[5]; and this Court has held that a state "may qualify its cession by reservations not inconsistent with the governmental uses" to which the United States intends to put the property. *Dravo Contracting Co.*, 302 U.S. at 141, 147; *Paul*, 371 U.S. at 264-265. A state thus may include a "requirement in the act of cession for return of sovereignty to the State when the ceded territory [i]s no longer used for federal purposes," *S.R.A., Inc. v. Minnesota*, 327 U.S. 558, 563 (1946), or where the property is not used for "the public purposes for which the property was acquired," *Fort Leavenworth R.R. Co.*, 114 U.S. at 542. *See Palmer v. Barrett*, 162 U.S. 399 (1896) (jurisdiction over land ceded for military purposes reverted to the state when the land was leased by the Navy to Brooklyn to be used as a marketplace).

So much is settled law. And it is settled as well that, even though the existence and scope of federal jurisdiction over acquired land depends on the consent of the state as expressed

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[5] Of course, Congress may assert regulatory authority over certain activities conducted in federal enclaves by virtue of sources of power other than the Enclave Clause. *See, e.g., Kleppe v. New Mexico*, 426 U.S. 529, 541-546 (1976) (Property Clause gives Congress authority to regulate activities on federal land even if the state has not ceded jurisdiction pursuant to the Enclave Clause).

in state laws, "[t]hat question . . ., involving the extent of the jurisdiction of the United States, is necessarily a federal question." *Silas Mason Co.*, 302 U.S. at 197. *See also Paul*, 371 U.S. at 267; *Wilson v. Cook*, 327 U.S. 474, 486 (1946).

2. It has proved easier to state those substantive rules than to formulate principles of construction for determining whether a particular exercise of jurisdiction over a federal enclave involves a matter that has been ceded to the federal government, on the one hand, or reserved by the state, on the other.

In an earlier period of our history, when many federal enclaves had only recently been acquired, the question frequently arose whether, in the first instance, the United States had assumed, and the affected states had ceded, exclusive jurisdiction over particular property. This Court was called upon to resolve many such disputes. *See, e.g., Silas Mason Co.; Dravo Contracting Co.; Fort Leavenworth R.R. Co.; Collins v. Yosemite Park Co.*, 304 U.S. 518 (1938); *Arlington Hotel Co. v. Fant*, 278 U.S. 439 (1929).

Such questions rarely have come before the Court in more recent years, largely because of the enactment in 1940 of a statute, codified at 40 U.S.C. 255, which "created a definite method of acceptance of jurisdiction so that all persons could know whether the government had obtained 'no jurisdiction at all, or partial jurisdiction, or exclusive jurisdiction'." *Adams v. United States*, 319 U.S. 312, 314 (1943) (quoting Hearings on H.R. 7293 before the House Committee on Buildings and Grounds, 76th Cong., 1st Sess. 7 (1939))[6].

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[6] The statute provides in pertinent part as follows:

> Notwithstanding any other provision of law, the obtaining of exclusive jurisdiction in the United States over lands or interests therein which have been or shall hereafter be acquired by it shall not be required, but the head or other authorized officer of any department or independent establishment or agency of the

The statute does *not*, however, speak to the Enclave Clause problem that is of principal concern in the post-1940 era. In many instances there have been major changes in the activities conducted by the federal government on enclaves acquired decades ago, and therefore courts must struggle with the question whether the current use of a federal enclave is so different from the use that was contemplated when the state initially ceded jurisdiction that the cession no longer should be considered operative. 40 U.S.C. § 255 does not specify any standards that should be applied in resolving such a question.

3. The court below assumed that the matter should be approached as if it were a routine question of land ownership governed by state real property law. Thus, the fact that the United States views its present jurisdiction over WFF as exclusive,[7] and the fact that Virginia never has asserted a right to reassume jurisdiction,[8] were accorded no signi-

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Government may, in such cases and at such times as he may deem desirable, accept or secure from the State in which any lands or interests therein under his immediate jurisdiction, custody, or control are situated, consent to or cession of such jurisdiction, exclusive or partial, not theretofore obtained, over any such lands or interests as he may deem desirable and indicate acceptance of such jurisdiction on behalf of the United States by filing a notice of such acceptance with the Governor of such State or in such manner as may be prescribed by the laws of the State where such lands are situated. Unless and until the United States has accepted jurisdiction over lands hereafter to be acquired as aforesaid, it shall be conclusively presumed that no such jurisdiction has been accepted.

[7] *See supra* at 4, 6.

[8] The Virginia agency responsible for enforcing the state "right-to-work" statute on which Respondent Pusey relies has determined that Virginia cannot enforce that law against contractors working at WFF because federal jurisdiction is exclusive. Exs. O, Q. On the other hand, a Virginia Deputy Attorney General has expressed the view that "the United States no longer enjoys exclusive jurisdiction over that territory." Ex. U2.

ficance, because, "in real property law," those considerations would be relevant only in the case of "a right of entry for condition broken" rather than a "possibility of reverter," App. 7a, and the court below viewed the terms of the Virginia cession statute as "similar to" the latter rather than the former, *id.*

In construing the "possibility of reverter" contained in the cession statute—which, as noted, provides that "the jurisdiction hereby ceded shall continue no longer than the United States shall own [the] lands in fee simple and they shall be used and occupied by the United States for naval purposes," *see supra* at 2—the Circuit Court did not pause to consider why the state and federal governments might have agreed to that particular provision. Instead, the court construed the words without any reference to the context in which they were used, and pronounced that the language referring to "naval purposes" should be construed as providing for federal jurisdiction only so long as the property was "used and occupied by the Navy." App. 10a. The court therefore deemed it conclusive that, upon transfer of custody to NASA, "the U.S. Navy . . . ceased to use and occupy the three parcels for Naval purposes." *Id.* To the Circuit Court, this necessarily meant that, as of 1961, "concurrent jurisdiction reverted to the Commonwealth of Virginia." *Id.*

Taking its reading a step further, the court declared that the transfer of custody from the Navy to NASA in 1961 so irrevocably terminated Virginia's cession of jurisdiction that the United States cannot assert exclusive jurisdiction today, even though "the Navy again [i]s permitted by NASA to use some of its property for some Naval purposes." App. 10a.

However, Virginia has taken no official position on the question, and the Deputy Attorney General's letter concludes with the recommendation that the matter "should, if at all possible, be settled with certainty between the Federal government and the States" by clarifying the matter through further statutory language. *Id.*

4. The state court's decision is unfounded. On its face, the reference in Virginia's cession statute to "naval purposes" is not confined to activities conducted directly by the United States Navy.[9] And the statute does *not* provide that exclusive federal jurisdiction may be exercised over WFF only as long as *the Navy* occupies the property; rather, the statute provides for exclusive jurisdiction as long as "*the United States* shall own such lands in fee simple and they shall be used and occupied by *the United States* for naval purposes." NASA is as much an agency of the United States as is the Navy; and even during the period when the Navy did not occupy any of the land, NASA continued to conduct aerospace activities relevant to the national defense, including launching more than 2500 rockets and satellites *for the Navy*. *See supra* at 3-4.

If the Virginia court's error were confined to a misreading of the state cession statute, this case might be a candidate only for summary reversal rather than for full briefing and argument. But the error of the Virginia court's analysis runs deeper.

In *Humble Pipe Line Co. v. Waggonner*, 375 U.S. 369 (1964), as in this case, the question presented was whether the United States had lost exclusive jurisdiction because it had ceased to use certain property for the particular military purpose—an air base—for which the land had been donated by the state. The United States (acting through the Department of the Interior rather than through the Air Force, *see id.* at 373 n.4) had leased to a private party the right to exploit parts of the land for oil and gas and for an oil pipeline. Louisiana contended "that the Federal Government ha[d] thereby lost its power to exercise exclusive jurisdiction over

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[9] Although the Circuit Court characterized the Virginia statute as allowing exclusive federal jurisdiction only for "*N*aval purposes," App. 7a, 10a (emphasis added), the statute actually refers to "*n*aval purposes," with a lower case "n".

those parts of the area." *Id.* at 372. This Court rejected that contention out of hand. "[R]ecogniz[ing] the responsibility of the Executive Department of the Government to determine what land it will acquire and hold for military purposes," *id.* at 373, the Court declared that, even though the federal government was not presently using portions of the land for military purposes, "[t]here is no evidence here which would justify a court in deciding that the government does not need to keep all of this tract intact, ready for use when needed for the highly important military purposes to which it has been dedicated," *id.*

Humble Pipe Line stands for the proposition that, where the United States has not purported to relinquish the exclusive jurisdiction it has been granted over an enclave, courts should not be quick to conclude that changes in the federal government's use of the property are such as to require a forfeit of exclusive jurisdiction. That proposition is supported by a least two considerations.

First, there is little to be said for a regime under which regulatory authority may ebb and flow between the federal government and a state on the basis of nothing more than a particular court's narrow construction of the purposes for which the state originally ceded jurisdiction. Here Petitioners were subjected to substantial retroactive liability for complying with federal agency fee law rather than state law, even though NASA, the NLRB and the Virginia Department of Labor and Industry all were of the view (as were the local law enforcement agencies, *see supra* note 4) that exclusive jurisdiction lay with the United States. This liability has been imposed, to the detriment of NASA's claim to exclusive jurisdiction, merely because the Virginia court chose, according to its own lights, to read the words "naval purposes" as confined to activities carried out *by*, rather than *for*, the United States Navy.

Second, as a general matter, construing a state cession statute broadly is more likely to give proper effect to the intent of both the state and federal governments than is a crabbed construction such as the court below adopted. Why, after all, would the Virginia legislature wish—as to land concededly owned by the United States—to cede exclusive jurisdiction if WWF is used by the *Navy* for an *airfield*, but not if it is used by *NASA* to support *rocket launches for the Navy*?

State property law concepts, such as the doctrine of "possibility of reverter" on which the Court below relied, *see supra* at 7, 12-13, simply are not designed to address the question whether regulatory authority over a federal enclave rests with Congress, the state legislature, or both. As *Humble Pipe Line* indicates, a court faced with that question must take into account the value of allowing the federal government leeway to alter its use of an enclave without risking a finding that it has forfeited exclusive jurisdiction merely because a particular court chooses to give a narrow construction to a state cession statute.

5. The Second Circuit recognized as much in *United States v. Johnson*, 994 F.2d 980 (2d Cir. 1993). There, New York ceded land to the United States "for use in connection with the expansion of the Brooklyn Navy Yard," and the United States was to have jurisdiction only for so long as the land was used "for the purposes of the cession." 994 F.2d at 986. The government eventually ceased using the property for "traditional navy yard work" (*i.e.*, shipbuilding), *id.*, and the contention was advanced that jurisdiction had reverted to the state as a result.

The Second Circuit rejected that contention, declaring that "Johnson's interpretation of the grant of jurisdiction is too strict, and does not allow for the evolution of the Navy's needs." *Id.* Emphasizing that "[t]he federal government must be given some leeway in making use of ceded property," *id.*, and citing *Waggonner*, the court concluded that "jurisdiction

ceded to the United States should not revert to the state merely because the function of ceded property evolves over time," *id.*

The *Johnson* court acknowledged that "it is conceivable that some evolution [of the use made of a federal enclave] might exceed the conditions of a grant of land *so severely* as to terminate the cession and cause a reversion of jurisdiction." *Id.* at 986 (emphasis added). By that language, however, the Second Circuit recognized, as this Court had indicated in *Waggoner*, that a court should not read a state cession statute in a manner that destroys the United States' exclusive jurisdiction over a federal enclave unless the federal government's current use of the enclave is *clearly* outside the purposes for which the state ceded jurisdiction. "[A] rigid interpretation of antiquated deeds [or statutes] that failed fully to anticipate the complex development of naval operations," *Johnson*, 994 F.2d at 986, is not a proper basis for curtailing federal jurisdiction over federal property.[10]

The Virginia court failed to heed these principles when it pronounced a "reverter" of jurisdiction from the United States to Virginia. It cannot plausibly be argued that the meaning of the "naval purposes" proviso in the 1940 Virginia statute is so clear as to compel the conclusion reached by the court below.

---

[10] Also inconsistent with the decision of the Virginia court is *Osburn v. Morrison Knudsen Corp.*, 962 F.Supp. 1206 (E.D. Mo. 1997). In *Osburn*, Missouri statutes transferred to the United States land "required for military purposes," and ceded exclusive jurisdiction so long as "the United States owns the land and uses the same for th[ose] purposes." *Id.* at 1208. The court held that exclusive jurisdiction was not lost when the Army ceased using the site altogether and transferred control to the Department of Energy to be decontaminated, even though there was no indication as to what use might be made of the site in the future. The court deemed it sufficient that the contaminated condition of the site was due to its *past* military use, and decontamination activities by the Department of Energy were not "*inconsistent with* military use." *Id.* at 1208-09 (emphasis added).

Rather, that court proceeded as if this were an ordinary dispute over private property, in which a court might be free to adopt any reading of the governing documents that is within the bounds of reasonableness, without regard to any particular federal interests. *Waggoner* and *Johnson* teach that that is no way to proceed where what is at stake is the exclusive jurisdiction of the United States over a federal enclave.

Certiorari should be granted to correct the Virginia court's improper encroachment on the exclusive federal jurisdiction that properly applies in this case, and to provide needed guidance to the lower courts respecting the analysis to be followed when it is claimed that the exclusive jurisdiction exercised by the United States over a federal enclave has been divested by virtue of the government's changing use of its property.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be granted.

Respectfully submitted,

THOMAS LUCAS
MCGUIRE, WOODS, BATTLE
& BOOTHE
9000 World Trade Center
101 West Main Street
Norfolk, VA 23510

JEREMIAH A. COLLINS
Counsel of Record
MARGO PAVE
BREDHOFF & KAISER, P.L.L.C.
805 15th Street, N.W.
Suite 1000
Washington, D.C. 20005
(202) 842-2600

JAMES J. VERGARA, JR.
VERGARA & ASSOCIATES
100 Main Street Plaza
Hopewell, VA 23860

APPENDIX A

VIRGINIA:

IN THE SUPREME COURT OF VIRGINIA
HELD AT THE SUPREME COURT BUILDING
IN THE CITY OF RICHMOND on
Wednesday 13th September, 2000.

Record No. 001048
Circuit Court No. 95CL010

LOCAL LODGE 2552, ETC., *et al.*,
Appellants,

against

FREDERICK A. PUSEY,
Appellee.

From the Circuit Court of Accomack County

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court is of opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

A Copy,

Teste:

DAVID B. BEACH, Clerk

By: /s/ Illegible,
Deputy Clerk

VIRGINIA:

IN THE SUPREME COURT OF VIRGINIA
HELD AT THE SUPREME COURT BUILDING
IN THE CITY OF RICHMOND on
Wednesday 13th September, 2000.

Record No. 001081
Circuit Court No. 95CL010

H & H CONSOLIDATED, INC.,
Appellant,

Against

FREDERICK A. POSEY,
Appellee.

From the Circuit Court of Accomack County

Upon review of the record in this case and consideration of the argument submitted in support of the granting of an appeal, the Court is of opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

A Copy,

Teste:

DAVID B. BEACH, Clerk

By: /s/ Illegible,
Deputy Clerk

APPENDIX B

VIRGINIA:

IN THE CIRCUIT COURT
FOR THE COUNTY OF ACCOMACK

AT LAW NO. 95CL010

FREDERICK A. PUSEY,
Plaintiff,

vs.

H & H CONSOLIDATED, INC., *et als.*,
Defendants.

OPINION

In this action at law for wrongful discharge of an employee, the Court must decide on motion for summary judgment whether it has jurisdiction to hear the matter. Specifically, the question is whether certain real property of the United States held by the National Aeronautics and Space Administration located at its flight facility on the mainland at Wallops Island, Virginia, is a Federal enclave where there would be exclusive Federal jurisdiction, or whether there is concurrent Federal and State jurisdiction at the facility, such that Virginia's Right-to-Work Laws would apply.

The plaintiff, Frederick A. Pusey, was employed by one of the defendants, H & H Consolidated, Inc., a private contractor with NASA at its Wallops Island, Virginia, flight facility. The defendant, Local Lodge 2552, and the defendant, District Lodge 74, both of the International Association of Machinists and Aerospace Workers, are the collective bargaining agents

for employees of H & H at the flight facility. Pusey was never a member of the union, though as an employee he was among those represented by the union. By the terms of a collective bargaining agreement between the union and H & H, all employees of H & H were required to be members of the union and pay dues, or if not members, pay an amount equivalent to dues.

The Right-to-Work Laws of Virginia, pursuant to Va. Code Ann. §40.1-58.1, *et seq* (1994 Repl. Vol.), provide generally that persons within the jurisdiction of the Commonwealth are not required as a condition of employment to either join a union or pay an amount equivalent to union dues. They may seek damages for an abridgement of the right to work. Nevertheless, for his failure to join the union representing H & H or pay an amount equivalent to dues, Pusey was discharged. Defendants' initial defense is that the Right-to-Work Laws of Virginia do not apply because the NASA facility is governed under exclusive Federal jurisdiction.

This lawsuit was commenced by a typical motion for judgment. Initially, defendants sought to remove the case to the United States District Court, which plaintiff resisted. Applying the law of removal of State-initiated actions to Federal Courts, the District Court remanded the case to this Court. The District Court did not decide the issue of jurisdiction for purposes of this case. The District Court stated "[i]t remains unclear whether the United States acted in accordance with the statutory authority to assume exclusive jurisdiction over the (NASA) facility. . . (and) there exists an additional question as to whether exclusive jurisdiction over Wallops Island (sic) reverted to Virginia. . . ." *Pusey v. H & H Consolidated, Inc.*, U.S.Dist. (E.D. Va.) (No. 2:95cv134, April 25, 1995).

The defendants filed their answers and affirmative defenses, among which is the defense that this cause of action arose at Wallops Island, Virginia, at the NASA flight facility,

a Federal enclave of exclusive jurisdiction, excluding the jurisdiction of this Court, and thus the effect of the Right-to-Work Laws of the Commonwealth of Virginia.

Plaintiff has filed his motion (revised) for partial summary judgment, requesting the Court to decide the issue of jurisdiction. All parties, recognizing this as a preliminary issue that would be dispositive of the matter, have agreed upon "Joint Stipulated Exhibits" filed with the Court as a basis for the Court's findings of facts and conclusions of law. Defendants also move for summary judgment in their favor on the issue of jurisdiction.

Apparently, all parties agree that if there is concurrent Federal and State jurisdiction, the Right-to-Work Laws of Virginia may apply, and if there is exclusive Federal jurisdiction, they do not apply.

The facts in this case on the issue of jurisdiction are quite interesting, but the evidence upon which they are based is not uncomplicated. The Court has reviewed the agreed joint stipulated exhibits and finds the facts that follow in this opinion.

The Federal Government can acquire exclusive jurisdiction over its proprietary property if the Federal and State Governments agree. *Paul v. United States*, 371 U.S. 245, 9 L. Ed 2d 292 (1963). The General Assembly of Virginia, 1940 Va. Acts, Chapter 14, ceded to the United States exclusive jurisdiction over such lands as were to be acquired for use as auxiliary airfields in connection with the development of the Hampton Roads Naval Air Station, provided that exclusive jurisdiction would continue "no longer than" such lands "shall be used and occupied by the United States for naval purposes." The head of any agency of the United States Government need not but may accept a cession of exclusive jurisdiction over property it acquires by filing a notice with the proper State authorities, without which no such exclusive

jurisdiction has been accepted. 40 U.S.C.S. §255 (Law. Co-op. 1994). That portion of the Act of Congress pertinent to this case was adopted in 1940.

What is now the mainland portion of the NASA facility, which is the subject of this lawsuit, was acquired by the United States Navy in four separate parcels of land. Incidentally, not among the four parcels is an actual island, an Eastern Shore of Virginia barrier island, also named Wallops Island, located east of the NASA mainland facility. Confusingly, the NASA mainland facility has the address, Wallops Island, Virginia. Rocket launching pads and the U. S. Navy AEGIS Combat Training System are presently located on the offshore island, which is connected to the Eastern Shore well south of the NASA mainland facility by a causeway and bridge.

The first of the four mainland parcels, containing 550.70 acres, was acquired in 1942 by condemnation "for the purpose of establishing an outlying landing field for the Fifth Naval District. . . ." Acting Secretary of the Navy, James Forestal, by letter received on May 6, 1943, by then Virginia Governor Colgate W. Darden, accepted exclusive jurisdiction on behalf of the United States.

The second parcel, containing 723 acres adjacent to the first parcel, was acquired by condemnation in 1942 "for the purpose of the use of the United States in connection with the establishment of an Outlying Flying Field. . . ." Acceptance of exclusive jurisdiction by Secretary Forestal was again accomplished by letter to Governor Darden received the same date, May 6, 1943.

The third parcel, containing 91.70 acres adjacent to the second parcel, was acquired by condemnation in 1944 "for use in the construction of a Naval Ordinance [sic] Aviation Test Station to be used in connection with the Naval Auxiliary Air Station. . . ." Acting Secretary of the Navy, Dan A. Kimball, by letter received five years later on

September 1, 1949, by then Virginia Governor William M. Tuck, accepted exclusive jurisdiction on behalf of the United States.

The fourth parcel, containing 879.83 acres adjacent to parcels two and three, was acquired by condemnation in 1952, "for the expansion of the United States Naval Auxiliary Air Station and Naval Aviation Ordinance [sic] Test Station. . . ." There has never been any notice of acceptance of exclusive jurisdiction on behalf of the United States filed with the Governor or in any other manner prescribed by the laws of the Commonwealth.

The question thus is narrowed further to a determination whether the exclusive jurisdiction of the United States in the three parcels reverted to the Commonwealth of Virginia for failure of the Navy to use and occupy the property for Naval purposes.

The language in the Virginia Act of the cession of jurisdiction is similar to language, in real property law, of the possibility of reverter and not similar to the language of a right of entry for condition broken. In the former the reverter in real property law is "automatic."

According to NASA history, the Secretary of the Navy transferred the Naval Air Station to NASA in 1959. At a formal ceremony the Navy Base Commander deactivated the facility, lowered its American flag, and a flag belonging to NASA was raised. All Navy personnel departed. That the entire four parcels were transferred, including both the Air Station and the Ordinance [sic] Test Station, is confirmed by a very significant letter from the Navy to NASA in 1961 describing the total acreage at 2,230 acres (it was most likely 2,245.23 acres), and valuing all property, improvements, utilities and 296 buildings at over $24,000,000.

Twenty-six years later, in 1987, NASA as host and the Navy through its Naval Sea Systems Command as tenant,

entered an agreement to permit Wallops Island to be used by NAVSEA to develop its AEGIS Combat Systems Center. It is clear from the agreement that it applies to the offshore Wallops Island. It is unclear whether it applies to the mainland NASA facility. The Navy began to use and occupy a substantial portion of the Island. From the agreement alone it would be an assumption at best that the Navy began to use and occupy the mainland NASA facility under examination in this case. Furthermore, there is no evidence that the Navy had used or been in substantial occupation or even partial occupation of the mainland facility for 26 years previous to the agreement. The Navy's AEGIS Commander at Wallops indicated by letter of April 8, 1988, that its personnel were residing at the NASA Wallops Flight Facility within a Navy compound. But the letter reflects that there was uncertainty regarding the nature of United States jurisdiction, and that the matter needed to be cleared up. In a letter of May 18, 1988, from Navy Legal Counsel to NASA Legal Counsel it is indicated that the residential compound for AEGIS was located on the acreage at the NASA facility for which no acceptance of jurisdiction document was ever located. And again, uncertainty over jurisdiction continues to be reflected in the letter. By letter of July 26, 1988, from NASA Legal Counsel to Navy Legal Counsel it is confirmed that the fourth parcel is the one upon which AEGIS residential housing is located. In a memorandum of February 16, 1990, to the Virginia Commissioner of Labor and Industry it is stated that in March of 1984 the Navy obtained a use permit from NASA for 60 acres on parcel four. It is interesting to note that in the memorandum attached to that letter NASA counsel observes that because Navy personnel have arrived and the tract is again being used and occupied by the Navy "then there might be a tenuous argument that exclusive jurisdiction would be regained." Then the observation follows that "without the letter of acceptance or some deed for the fourth

parcel we cannot assume exclusive jurisdiction was initially given."

Then, significantly, in a letter of August 9, 1989, from Frank Moore of NASA to the Virginia Department of Labor and Industry it is concluded that the mainland NASA facility is not subject to exclusive Federal jurisdiction. Thus, we have the NASA conclusion at that time, whether or not its opinions are significant.

Regarding recent use by the Navy of parcels one, two and three, an investigation conducted for the Virginia Department of Labor and Industry in 1990 found that the Navy periodically uses the airfield for unscheduled landing of aircraft and for refueling during training from a Maryland Navy Base. The airfield is available for emergency landing. However, there are no Navy planes stored at Wallops, nor are there Navy personnel other than AEGIS personnel on parcel four.

Nevertheless, when confronted with the issue of whether to enforce Virginia's Right-to-Work Laws at the NASA facility, the Department of Labor and Industry concluded that there continued to be exclusive Federal jurisdiction over the whole NASA facility. The Commissioner, Carol Amato, declined to intervene by letter to NASA in May of 1990. Frank Moore of NASA, in a clear and concise letter of June 25, 1990, to Carol Amato, noted his exception.

By 1994 General Counsel for NASA had apparently concluded that there very well may be exclusive Federal jurisdiction at the NASA flight facility. The Attorney General of Virginia, in a letter of September 16, 1994, to NASA General Counsel states the opinion of the Attorney General that the mainland parcels at the NASA facility are not subject to exclusive Federal jurisdiction.

This Court's conclusion regarding the material facts is that it is clear that there never has been exclusive Federal

jurisdiction in the Federal Government on parcel four. And as of 1961 the U. S. Navy transferred parcels one, two and three, over which the Federal Government had exclusive jurisdiction, to NASA and ceased to use and occupy the three parcels for Naval purposes. That condition continued for many years. Therefore, concurrent jurisdiction reverted to the Commonwealth of Virginia. There is no law that provides that exclusive Federal jurisdiction could spring up again at the much later time when the Navy again was permitted by NASA to use some of its property for some Naval purposes.

The matter of governmental jurisdiction over lands acquired by the United States is statutory. *Waltrip v. Commonwealth*, 189 Va. 365, 53 S.E. 2d 14 (1949) and *United States v. Johnson*, 994 F. 2d 980 (2d Cir. 1993). The basis for determining jurisdiction used by the Virginia Department of Labor and Industry is not appropriate. There is no law indicating that jurisdiction is determined by the way in which a Federal facility is operated or presents itself in terms of jurisdiction, nor by the way in which a facility is perceived and treated by others in that regard. Only cession and acceptance in the formal manner prescribed by the cited statutes will confer exclusive jurisdiction. Furthermore, exclusive jurisdiction may be qualified or conditional. *Pratt v. Kelly*, 585 F.2d 692, 696 (1978); *S.R.A., Inc. v. Minnesota*, 327 U.S. 558, 90 L. Ed 851 (1945). If the conditions as stated come to pass, as in this case, the exclusive nature of jurisdiction can revert if that is what is provided in the cession of jurisdiction.

On the central factual issue in this case, whether the property ceased to be used and occupied by the Navy, the defendants argue that *Johnson*, 994 F. 2d at 986, is controlling in their favor. Defendants' reliance on that case is mistaken. It is clear from that case that the interpretation regarding use and occupation must be broad and inclusive, not strict, allowing for evolution of the Navy's needs. But in

the case at bar there is not a question of the function of the ceded property evolving over time, but whether it ceased altogether. In the *Johnson* case the Navy continued to occupy the property, though it had ceased to use the property for shipbuilding and traditional Navy yard purposes as originally envisioned. Here, the entire property, all three parcels that were ceded exclusively to the Navy, ceased to be either used or occupied by the Navy for many years. The property was transferred to NASA. The Navy left completely and at that time permanently causing jurisdiction to revert to the Commonwealth. It is not credible to argue the "evolution" concept of the *Johnson* case on the facts here. And there is no re-creation concept known to the law of jurisdiction, which is given or taken by executive action based on legislative authority. Certainly as title by adverse possession of land does not apply against governments, neither does adverse jurisdiction.

September 25, 1997

/s/ Glen A. Tyler
GLEN A. TYLER, JUDGE

APPENDIX C

[ORIGINAL]

VIRGINIA:

IN THE CIRCUIT COURT
OF ACCOMACK COUNTY

Case Number 95-CL-010

FREDERICK A. PUSEY,
Plaintiff,

v.

H & H CONSOLIDATED, INC.,
IAM LOCAL LODGE 2552,
and IAM DISTRICT LODGE 74,
Defendants.

ORDER

This case came to be heard on the 2lst day of August, 1997 on cross-motions for summary judgment. The central issue to the parties' motions is whether the Federal government has "exclusive" jurisdiction over NASA's Wallops Flight Facility.

Upon consideration of the stipulated facts, arguments of counsel, the pleadings filed herein, and the reasons stated in the Court's opinion of September 25, 1997, the Court finds that:

(1) any "exclusive" jurisdiction ceded to the Federal government over lands presently included within the NASA Wallops Flight Facility, reverted to the

Commonwealth in 1961 , when those lands ceased to be "used and occupied for naval purposes;"

and

(2) the Federal government has "concurrent" jurisdiction with the Commonwealth over the lands comprising the NASA Wallops Flight Facility.

Accordingly, it is hereby

ORDERED that the Defendants' Motion For Summary Judgment is DENIED and the Plaintiff's Motion For Partial Summary Judgment as to the "jurisdictional status" of the NASA Wallops Flight Facility is GRANTED.

The Clerk is directed to send a copy of this order to counsel of record, who shall file such objections hereto as deemed advisable within ten days of their receipt of a copy of this order. Endorsement of counsel is dispensed with pursuant to Supreme Court Rule 1:13.

ENTERED this 2nd day of February, 1998.

/s/ Glen A. Tyler,
GLEN A. TYLER, JUDGE
Circuit Court for Accomack County

I ASKED FOR THIS:

/s/ Robert F. Gore
ROBERT F. GORE
% National Right to Work Legal Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, Virginia 22151
(703) 321-8510

Attorney for the Plaintiff

APPENDIX D

VIRGINIA: [BK 0016 PG 00228]

IN THE CIRCUIT COURT
OF ACCOMACK COUNTY

At Law No.: 95CL010

FREDERICK A. PUSEY,
Plaintiff,

v.

H & H CONSOLIDATED, INC.,

AND

LOCAL LODGE 2552,
INTERNATIONAL ASSOCIATION OF MACHINISTS
& AEROSPACE WORKERS,

AND

DISTRICT LODGE 74, INTERNATIONAL
ASSOCIATION OF MACHINISTS
& AEROSPACE WORKERS,
Defendants.

ORDER

THIS 22nd day of July, 1999 came the Plaintiff, Frederick A. Pusey, by his counsel, Ayres & Hartnett, P.C. and the Defendant, H & H Consolidated, Inc., by its counsel, McGuire, Woods, Battle and Boothe and the Defendants, Local Lodge 2552, International Association of Machinists & Aerospace Workers and District Lodge 74, International Association of Machinists & Aerospace Workers, by their counsel Vergara & Associates upon the Plaintiff's renewed Motion for Partial Summary Judgment; upon the Defendant

Union's Motion for Summary Judgment and that in opposition to the Plaintiff's Motion; upon the opening brief of the Plaintiff in support of his Motion for Partial Summary Judgment; upon the Union's brief in response thereto and in support of the Union's Motion for Summary Judgment; upon the Plaintiff's brief responding to the Union; upon the reply brief of the Union; and upon the Motions and supporting briefs of H & H Consolidated, Inc. concurring with the Defendant, Unions.

Whereupon, the Court recognized John C. Scully, Esquire in person and on brief and now upon the papers formerly filed and on motion of Daniel Hartnett, Esquire of Ayres & Hartnett, P.C. admits the said John C. Scully, Esquire to appear *pro hac vice* as counsel in this matter on behalf of the Plaintiff.

Additionally, Defendant, Union filed with the Court as exhibits two sets of documents representing responses by NASA to a Freedom of Information Act request and all parties stipulated as to their authenticity, and the exhibits are hereby accepted as exhibits and made a part of the record.

Whereupon, all motions and briefs were fully argued by counsel.

In consideration whereof it is Ordered that the Plaintiff's Motion for Partial Summary Judgment as to liability be and hereby is granted and the Defendants' Motions for Summary Judgment be denied and that the trial of this matter proceed forthwith solely upon the issue of the Plaintiff's damages. To which action of the Court, the Defendants, H & H Consolidated, Inc. and IAM Local Lodge 255 and IAM District Lodge 74, by counsel, objected and excepted for such reasons formerly argued in their briefs and orally before the Court.

And for good cause shown, it is further Ordered that the trial of this matter now set for the 17th and 18th days of

November, 1999 be continued until the 15th and 16th days of December, 1999.

And proceeding further, it is Ordered, after discussion with counsel, that the pre-trial conference in this case be set for 2:30 pm on the 29th day of November, 1999 at which time all outstanding matters shall be brought to the attention of the Court for disposition.

ENTERED this 17 day of November, 1999.

/s/ Glen A. Tyler,
GLEN A. TYLER, JUDGE

We ask for this:

JOHN C. SCULLY, ESQUIRE
NATIONAL RIGHT TO WORK LEGAL
DEFENSE FOUNDATION, INC.
8001 Braddock Road, Suite 600
Springfield, VA 22160
(703) 321-8510

/s/ Daniel Hartnett
DANIEL HARTNETT, ESQUIRE
AYRES & HARTNETT, P.C
Post Office Box 216
Accomac, VA 23301
(757)787-1341

Counsel for the Plaintiff

Seen and Objections Noted:

/s/ Thomas Lucas
RUTHIE LITVIN, ESQUIRE
THOMAS LUCAS, ESQUIRE
MCGUIRE, WOODS, BATTLE & BOOTHE
9000 World Trade Center
101 West Main Street
Norfolk,VA 23510

Counsel for the Defendant, H & H Inc.

/s/ James J. Vergara, Jr.
JAMES J. VERGARA, JR., ESQUIRE
VERGARA & ASSOCIATES
100 Main Street Plaza
Hopewell, VA 23860
Counsel for the Defendant, Unions

APPENDIX E

VIRGINIA:

IN THE SUPREME COURT OF VIRGINIA
HELD AT THE SUPREME COURT BUILDING
IN THE CITY OF RICHMOND on
Friday the 3rd day of November, 2000.

Record No. 001048
Circuit Court No. 95CL010

LOCAL LODGE 2552, *etc., et al.*,
Appellants,

against

Frederick A. Pusey,
Appellee.

Record No. 001081
Circuit Court No. 95CL010

H & H Consolidated, Inc.,
Appellant,

against

Frederick A. Pusey,
Appellee.

Upon a Petition for Rehearing

On consideration of the petition of the appellants to set aside the judgments rendered herein on the 13th day of September, 2000 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,
Teste:
/s/ David B. Beach
Clerk

APPENDIX F

VIRGINIA:

IN THE CIRCUIT COURT OF ACCOMACK COUNTY

AT LAW No.: 95CL010

Frederick A. Pusey

Plaintiff,

v.

H & H CONSOLIDATED, INC.,

AND

LOCAL LODGE 2552, INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS,

AND

DISTRICT LODGE 74, INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS,

Defendants.

ORDER

THIS DAY CAME the Plaintiff, Frederick A. Pusey, by his counsel, Ayres & Hartnett, P.C. and John C. Scully, Esquire and the Defendant, H & H Consolidated, Inc., by its counsel, McGuire, Woods Battle and Boothe and the Defendants, Local Lodge 2552, International Association of Machinists & Aerospace Workers and District Lodge 74, International Association of Machinists & Aerospace Workers, by their counsel, Vergara & Associates.

Thereupon came a jury to-wit:

> Vivian Daisey, Rodman Tarr, Judith Redifer, Joseph Evans, Robert Joynes, Linda Mears, Carl Ayres & Joyce Milliner,

who, after proper examination, were duly sworn to well and truly try the issues joined between the Plaintiff and the Defendants. One of foregoing being an alternate juror to be disclosed and discharged immediately prior to the matter being submitted to the jury for its deliberation and consideration.

Whereupon, the Court proceeded to hear evidence on behalf of the Plaintiff; at the conclusion of which both counsel for the Defendants moved the Court to strike the Plaintiff's evidence in whole or in part for reasons stated in the record, which motions, after being considered by the Court, were denied, to which action of the Court, both the Defendants, by counsel, objected and excepted.

And proceeding further, the Court heard evidence on behalf of the Defendant, H & H Consolidated; at the conclusion of which the Court proceeded to hear evidence on behalf of the Local Lodge 2552, International Association of Machinists & Aerospace Workers and District Lodge 74, International Association of Machinists & Aerospace Workers.

At the conclusion of all the evidence, both Defendants, by counsel, renewed their motions to strike part or all of the evidence for reasons stated in the record, which motions, after consideration, were likewise denied by the Court; to which actions of the Court the Defendants, by counsel, objected and excepted.

Whereupon, the Court, notwithstanding the objections and exceptions formerly made herein of all the Defendants, by counsel, instructed the jury solely as to whether the Plaintiff

was entitled to damages and the amount thereof and the matter was fully argued by all counsel. At the conclusion of all arguments by counsel, the alternate juror designated by the Court as Rodman Tarr was duly discharged from further service and the remaining seven jurors were retired to commence their deliberation.

And proceeding further in the absence of the jury, the Court heard evidence on behalf of the Defendants H & H Consolidated, in support of its Cross-claim formerly filed against the Defendants, Local Lodge 2552, International Association of Machinists & Aerospace Workers and District Lodge 74, International Association of Machinists & Aerospace Workers. At the conclusion of such evidence, the Cross-claim was fully argued by counsel for H & H Consolidated and counsel for the Local Lodge 2552, International Association of Machinists & Aerospace Workers and District Lodge 74, International Association of Machinists & Aerospace Workers.

In consideration whereof, the Court advanced a briefing schedule and deferred further ruling on the matter until such time as the briefs have been submitted and considered by the Court.

Whereupon, the jury, having completed its deliberations, returned in open Court and rendered the following verdict:

We, the jury, on the issue joined, find in favor of the plaintiff against the defendants and assess his damages at $135,000.00.

/s/ Carl A. Ayres
CARL A. AYRES
Foreman/Forewoman

December 16, 1999

There being no motion to poll the members of the jury as to their verdict, the verdict was accepted by the Court and the jury discharged.

Whereupon, counsel for both Defendants moved the Court to set aside the verdict and enter judgment in favor of the Defendants or, in the alternative, grant the Defendants a new trial for those reasons stated with particularity in the record and was argued by counsel.

In consideration whereof the Court denied the motions and entered judgment in favor of the Plaintiff in the amount of $135,000.00 with interest as provided by law from the 16th day of December 1999 together with the costs of this proceeding. To which actions of the Court, the Defendants, by counsel, objected and excepted for reasons stated in the record.

While entering final judgment in favor of the Plaintiff as aforesaid, the Court reserves and continues the matter of the Cross-claim between the Defendants herein for further consideration.

ENTERED this 10th day February 2000.

/s/ Glen A. Tyler
JUDGE

We ask for this:

John C. Scully, Esquire
National Right To Work Legal
Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield VA 22160
(703)321-8510

/s/ Daniel Hartnett
DANIEL HARTNETT, ESQUIRE
AYRES & HARTNETT, P.C.
Post Office Box 216
Accomac, VA 23301
(757) 787-1341
Counsel for the Plaintiff

Seen and Objected to for those
reasons stated in the record:

/s/ Thomas Lucas
THOMAS LUCAS, ESQUIRE
MCGUIRE, WOODS, BATTLE &
BOOTHE
9000 World Trade Center
101 West Main Street
Norfolk, VA 23510
Counsel for the Defendant,
H & H Inc.

/s/ James J. Vergara, Jr.
JAMES J. VERGARA, JR., ESQUIRE
Vergara & Associates
100 Main Street Plaza
Hopewell, VA 23860
Counsel for the Defendant, Unions

A copy teste Samuel H. Cooper, Jr.,
Clerk

By: /s/ *Coretta S. Travis*, DY

Supreme Court, U.S.
FILED
MAR 30 2001
CLERK

No. 00-1254

IN THE

Supreme Court of the United States

LOCAL LODGE 2552, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT LODGE 74, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AND H & H CONSOLIDATED, INC.,
Petitioners,

v.

FREDERICK A. PUSEY,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Virginia

RESPONDENT FREDERICK PUSEY'S BRIEF IN OPPOSITION

JOHN C. SCULLY*
National Right to Work Legal Defense Foundation, Inc.
8001 Braddock Road
Springfield, VA 22160
(703) 321-8510

DANIEL HARTNETT
Ayres & Hartnett, P.C.
Court Green
Accomac, VA 23301
(757) 787-1341

ATTORNEYS FOR RESPONDENT
*Counsel of Record

March 2001

QUESTION PRESENTED

Respondent takes issue with Petitioners' statement of the Question Presented and re-states as follows:

Did the court below err when it made a factual determination that a state employment statute applies on a federal enclave, since the federal government no longer has exclusive jurisdiction on the enclave?

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Respondent Frederick Pusey respectfully submits this Brief in Opposition to the Petition of Local Lodge 2552, International Association of Machinists and Aerospace Workers ("IAM"), District Lodge 74, IAM, ("unions") and H & H Consolidated ("employer"). Respondent Pusey urges that the Court deny the Petition.

STATEMENT OF THE CASE

In February 1940, the Virginia General Assembly ceded to the federal government "exclusive" jurisdiction for unspecified lands to be acquired within the Commonwealth for construction of naval air fields to aid in the defense of the Naval Operating Base at Hampton Roads (Norfolk). This cession of "exclusive" jurisdiction was not without condition, however. The Virginia General Assembly specifically conditioned the continued grant of "exclusive" jurisdiction by providing "*that the jurisdiction hereby ceded shall continue no longer than* the United States shall own such lands in fee simple and *they shall be used and occupied by the United States for naval purposes.*" (1940 Virginia Acts of Assembly, ch. 14; Stipulated Exhibit ("Ex.") A. (Emphasis added). Additionally, in February 1940, Congress amended 40 U.S.C. § 255 to clarify how federal agencies could acquire "exclusive" jurisdiction over lands owned or acquired by the federal government. (Ex. B).

During World War II, the federal government acquired by condemnation three parcels of land (Parcels I,

II and III) in Accomack County, Virginia for construction of the Naval Air Station[1] in Chincoteague, Virginia. Pursuant to federal and state laws, the U.S. Navy acquired "exclusive" jurisdiction over each of these parcels of land. (Exs. C–F3).

In April 1947, Virginia enacted a Right to Work law declaring that it was "the public policy of Virginia that the right of persons to work shall not be denied or abridged on account of membership or nonmembership in any labor union or labor organization." VA. CODE ANN. §§ 40.1-58 to -69 (Michie 1994). Other sections of the law made it unlawful for an employer to require an employee to join a union or pay dues, fees or other charges to it as a condition of employment. The prohibitions of the law applied to any and all contracts negotiated subsequent to April 30, 1947. The law also provided for a private cause of action by any person injured by violation of his right to work.

In 1952, the federal government acquired an additional parcel of land (Parcel IV) to expand the Navy's facilities at Naval Air Station Chincoteague. (Exs. C, G1–2). A detailed review of the land records of Accomack County, and of the files of the U.S. Navy, the National

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[1]At various times during its existence, the U.S. Navy designated its air station at Chincoteague, Virginia as Naval Air Station ("NAS") Chincoteague, Naval Auxiliary Air Station ("NAAS") Chincoteague, and Naval Aviation Ordnance Test Station ("NAOTS") Chincoteague.

Aeronautics and Space Administration ("NASA"), and the Virginia Attorney General's Office fails to disclose any attempt by the federal government to acquire "exclusive" jurisdiction over Parcel IV. (Exs. J, K4–6, U1–2, W1). In fact, the only two records that address this issue indicate that the U.S. Navy never sought to acquire "exclusive" jurisdiction over Parcel IV. (Exs. C (Legend), G3). Accordingly, pursuant to 40 U.S.C. § 255, it conclusively must be presumed that the federal government never acquired "exclusive" jurisdiction over Parcel IV.

On June 30, 1959, the U.S. Navy officially closed its naval air station at Chincoteague, Virginia and transferred the base and its facilities on an interim occupancy permit to NASA, which renamed it the Wallops Flight Facility. (Ex. H2). A formal base closing occurred that year. The Navy commander lowered its American flag and a flag belonging to NASA was raised. All Navy personnel departed. In December 1961, the U.S. Navy formally transferred all of the real property and improvements of its former air station to NASA. (Ex. H3).

In January 1987, Respondent Frederick Pusey, a retired United States Army Sergeant Major, went to work for the Klate-Holt Company (a predecessor to Petitioner H & H Consolidated) as an electronics technician, and was employed at the company's offices on the Wallops Flight Facility. Local Lodge 2552, IAM and District Lodge 74, IAM served as the exclusive bargaining representatives of Klate-Holt employees. The unions and Klate-Holt (and its

successors, including H & H Consolidated) were parties to a series of collective-bargaining agreements.

In the fall of 1987, some **twenty-eight (28) years after closing its air station** and **twenty-six (26) years after transferring all property and buildings to NASA**, the U.S. Navy **returned** to a portion of Wallops Flight Facility as a ***tenant*** and entered into a formal Host-Tenant Agreement with NASA.

As a tenant, the U.S. Navy established an "AEGIS Combat System Center" to train naval personnel in operating its Aegis missile system from launch facilities on Wallops Island.[2] (Exs. K1-3). In addition to its operations on Wallops Island (over which the federal government never had exclusive jurisdiction), the Navy located some of its administrative and housing facilities on Parcel IV of the Wallops Flight Facility (again, land over which the federal government never had exclusive jurisdiction).

The Navy did **not** return to the three land parcels over which it had at one time acquired exclusive jurisdiction. The only use by the Navy of the mainland parcels after its abandonment was that, from 1987 forward, the Navy occasionally used the mainland parcels for unscheduled landing and refueling during training exercises from a

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[2]The actual AEGIS training and missile launch facilities are located on Wallops Island itself and are not part of the original four parcels that compromised the Naval Air Station. It was on Wallops Island that NASA launched missiles for the Navy.

Maryland naval base, and made it available for emergency landings. In summary, after abandoning and transferring Parcels I, II and III to NASA, the Navy never returned to those parcels. Twenty-six (26) years after departing, the Navy may have occupied, as tenants, Parcel IV (over which the federal government never had exclusive jurisdiction) and did occupy Wallops Island over which the federal government also never had exclusive jurisdiction.

In the spring of 1988, the officer-in-charge of AEGIS Combat System Center expressed concern to his superiors about the jurisdictional status of the Wallops facility, since the U.S. Navy was making a large scale commitment there. Subsequently, NASA and the U.S. Navy exchanged letters concerning the jurisdictional status. Although these letters discussed legal theories for finding "exclusive" federal jurisdiction, there was never any final resolution to the question. In a November 1988 Memorandum for the Record, NASA's counsel reiterated his belief that NASA did not have exclusive jurisdiction but had only "proprietary" jurisdiction over the Wallops Flight Facility. (Exs. K3-6).

In 1989, the unions, as the exclusive bargaining representatives of employees working for private contractors operating on the Wallops Flight Facility, began negotiating "union-security" agreements with the private contractors, including Klate-Holt. After many non-union employees, including Mr. Pusey, refused to join or support the unions as required by the union-security agreements, the

unions notified employees they would be discharged if they did not comply with the membership requirement. (Exs. L1–3).

In August 1989, NASA's contracting officer at the Wallops Flight Facility wrote to the Klate-Holt Company and the other private contractors which had collective-bargaining agreements containing union-security agreements. He notified them that since NASA's legal counsel believed that the federal government had only "proprietary" or "concurrent" jurisdiction and not exclusive jurisdiction, and because Virginia law prohibited "union-security" agreements, NASA was notifying the appropriate Virginia agency concerning possible violation of Virginia's Right to Work law. (Ex. M1). As a result of this notice, Klate-Holt refused to enforce its "union-security" agreement.

After NASA contacted the Virginia Department of Labor and Industries ("DLI") in August 1989, the DLI commenced an investigation to determine whether state or federal law applied to the Wallops Flight Facility. The parties' "Joint Stipulation of Facts and Exhibits" contains highlights of that investigation. (*See* Exs. A, B, D3, E3, F3, H3, H4, I, K6, M3, N1–8 for an overview of the DLI investigation). In May 1990, the DLI completed its investigation and its Commissioner stated that in her view the "Federal government retain[ed] exclusive jurisdiction," therefore the DLI was not going to take any additional action. Her determination was based on the fact that the Navy periodically uses the airfield for unscheduled landing

and refueling during training exercises from a Maryland naval base and is available for emergency landings. (Ex. O).

In June 1990, NASA took issue with the DLI's "conclusion that the Federal Government appears to retain exclusive jurisdiction over Wallops Flight Facility" and wrote a letter asking for "any guidance that you or the [Virginia] Attorney General can give us on how we should proceed to [conclusively resolve the jurisdictional question]." (Ex. P).

On September 10, 1990, the DLI Commissioner responded by clarifying the Department's decision that the federal government retained exclusive jurisdiction over Wallops, and recommending that if NASA wanted to change the jurisdictional status of Wallops, it follow the procedures contained in Virginia Code Section 7.1-25.1. (Ex. Q).

Notwithstanding the DLI Commissioner's letter of September 10, 1990, NASA continued to maintain that it had only proprietary jurisdiction over the Wallops Flight Facility. In a series of letters to interested parties, including agents and representatives of the unions, NASA reiterated its position *viz-a-viz* jurisdiction while noting that it was the Agency's long-standing policy to remain neutral regarding any disputes between the unions and contractors over the enforceability of union-security agreements.

In April 1992, the unions attempted to enforce their union-security agreement against Mr. Pusey and various other non-union employees of H & H Consolidated (Klate-Holt's successor). The unions were unsuccessful. (Exs. R5–6).

On January 1, 1994, a new collective-bargaining agreement between Mr. Pusey's employer and the unions went into effect. Paragraphs D and E of Article VI are the union-security and hold-harmless clauses of the agreement which are at issue in this litigation. (Ex. T1, p.5). Following the expiration of a thirty (30)-day grace period, the unions enforced the agreement by notifying non-union employees—including Mr. Pusey—of their obligations under the union-security agreement, as well as informing the company that, after notice, the non-union employees had still not complied with the agreement. (Exs. T2–3).

Local Union 2552 then renotified Mr. Pusey of his obligations under the union-security clause and gave him five (5) days in which to comply or it would seek his discharge. Likewise, the company notified Mr. Pusey of his obligations and gave him until May 16, 1994 to either, (1) become a member of the union or pay the required service fee or, (2) be discharged on that date. On May 11, 1994, Local 2552 notified H & H Consolidated that Mr. Pusey had not complied with the union-security clause and formally

requested his discharge.[3] On May 13, 1994, H & H Consolidated notified Mr. Pusey that he was discharged effective 8:00 a.m. on May 16, 1994. (Exs. T8–11).

As early as 1982, the Virginia Attorney General took the position that the federal government did not have exclusive jurisdiction over Wallops. (Ex. I). That position was reiterated on September 16, 1994, when Virginia Deputy Attorney General Paul Woodley responded to NASA, stating:

> I do not agree with your opinion concerning jurisdiction over the four mainland parcels. With respect to parcel 4, the United States, in the absence of any formal acceptance, in my opinion, enjoys simple proprietary jurisdiction over the territory shown as parcel 4, and always enjoyed only proprietary jurisdiction over it. *Smith v. Commonwealth*, 219 Va. 455, 248 S.E.2d 135 (1978), *cert. denied*, 441 U.S. 967 (1979). Practice or perception do not substitute for formal acceptance. With respect to the other three parcels, the United States no longer enjoys exclusive jurisdiction

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[3]In a letter dated May 12, 1994, NASA wrote Virginia Attorney General Gilmore reversing its prior longstanding position and now concluding that the federal government did have exclusive jurisdiction over Parcels I through IV. NASA further requested the opinion of the Virginia Attorney General on some jurisdiction questions.

> over that territory because in 1961 the land ceased to be controlled by the Navy, and the United States no longer occupies it for naval purposes.

(Ex. U2).

In 1995, Respondent Frederick Pusey filed a lawsuit against Petitioners in the Circuit Court of Accomack County for violating his right to work under VA. CODE ANN. §§ 40.1-58 to -69 (Michie 1994). Petitioners removed the case to the U.S. District Court for the Eastern District of Virginia. The U.S. District Court remanded the case to the Accomack County Circuit Court, finding "that there exists a genuine issue of material fact as to whether the federal government affirmatively acted to obtain exclusive jurisdiction over Wallops Island and, if it did, whether it currently retains its jurisdiction." (App. 10a). On remand, after full briefing by the parties, the Accomack County Circuit Court ruled on cross-motions for summary judgment and made the factual determination that the federal government does not have exclusive jurisdiction over the Wallops Flight Facility. The circuit court found that Petitioners were liable for Respondent's discharge. A jury then awarded Respondent damages in the amount of $135,000, with interest.

REASONS FOR DENYING THE WRIT

This case is not worthy of review. It presents a split neither in the circuits nor in any appellate courts, and is not contradictory to any decision of this Court.

Petitioners do not claim any split in the circuits is involved in this case. Petitioners are left to argue that the court's decision below was wrong and that this Court should take this case to overturn the unreported factual determination made by the trial court. The U.S. Supreme Court is not a trier of fact. Second-guessing factual determinations of trial courts is not a role for the nation's High Court. This was not and is not a case worthy of review. Moreover, the federal district court remanded this case to the state court and in so doing determined that the state court should make the factual determination whether the federal government had exclusive or proprietary jurisdiction over the enclave.

Petitioners further argue that their Petition should be granted so this Court might provide guidance to lower courts how to determine when the federal government divests itself of exclusive jurisdiction over an enclave. There is no confusion — much less widespread confusion — in the lower courts that calls out for this Court to provide them guidance. The paucity of reported cases involving this question, much less any split in appellate decisions on this issue, dramatizes that there is no need for this Court to provide guidance to the courts below.

Finally, the determination of the trial court concerning the status of the enclave was correct. Petitioners present no cogent reason to reverse that determination.

I. This Case Involves a Factual Dispute. There Is No Split in the Circuits or Amongst Any Appellate Courts, and the Decision of the Court Below Is Not Contrary to the Decisions of This Court.

A. There Is No Split in the Circuits and This Case Is Not Contrary to Any Decision of This Court.

Petitioners fail to point to a single split in the circuits or any conflict between the holding of the court below and that of any appellate court.

Petitioners claim that the decision below is contrary to this Court's holding in *Humble Pipe Line v. Waggonner*, 376 U.S. 366 (1964). That is not true. This case presents no conflict with *Humble Pipe Line*. The distinction between *Humble Pipe Line* and this case is based solely on factual issues. *Humble Pipe Line* stands for the proposition that when the federal government acquires exclusive jurisdiction over an enclave for military purposes, the fact that the government subsequently leases out a portion of the enclave does not divest the federal government of its exclusive jurisdiction. The case below does not in any way contradict that holding. This case, unlike *Humble Pipe Line*, does not involve the lease of a portion of an enclave, but rather the total abandonment of the entire enclave.

Similarly, Petitioners are mistaken when they argue that the case below is in conflict with the Second Circuit's decision in *United States v. Johnson*, 994 F.2d 980 (2d Cir.), *cert. denied*, 510 U.S. 959 (1993). In *Johnson*, the

defendant-appellant challenged his criminal conviction for acts occurring on federal property to which exclusive jurisdiction was ceded "for use in connection with the expansion of the Brooklyn Navy Yard," and was related to a parcel for which exclusive jurisdiction was ceded for use as a "navy yard and naval hospital," for "so long only as the land shall be used for the purposes of the cession." The defendant challenged his conviction on the theory that since the Brooklyn Navy Yard was no longer used for shipbuilding — although it still was used by the Navy "for other ancillary naval functions" — the conditions of the cession no longer were met. The United States Court of Appeals for the Second Circuit rejected this interpretation of "antiquated deeds" as "too strict." 994 F.2d at 986. However, the court conceded that "it is conceivable that some evolution might exceed the conditions of a grant of land so severely as to terminate the cession and cause a reversion of jurisdiction." *Id.* As discussed by the court below, this case is easily distinguishable from *Johnson*. *Johnson* involved an evolution of naval use over time. This case involves not an evolution of use by the Navy but a total abandonment.

B. This Case Involves a Question of Fact That Is Not Appropriate for Review by This Court.

A simple issue was presented to the state circuit court: Did the federal government have exclusive or concurrent jurisdiction over the federal enclave where Respondent Frederick Pusey was employed? If so, did the

employer and unions violate the Virginia Right to Work law when Mr. Pusey was fired for not joining or financially supporting the unions?

That question is factual. After removal, the U. S. District Court for the Eastern District of Virginia remanded the case to the Accomack County Circuit Court, finding "that there exists a *genuine issue of material fact as* to whether the federal government affirmatively acted to obtain exclusive jurisdiction over Wallops Island and, if it did, whether it currently retains its jurisdiction." (Emphasis added) (Appendix ("App.") 10a).

The circuit court reviewed the factual record and determined that the federal government did not have exclusive jurisdiction over the enclave. Petitioners' attempts to argue that the case below was wrongly decided are fact-based claims. Unless this Court wishes to become the trier of fact to determine what the Navy did when it abandoned the enclave, which parcels the Navy subsequently occupied during its limited post-abandonment use and what the Navy did on those parcels, it should deny review. The Petitioners' primary factual argument involves the question whether NASA's launching of missiles for the Armed Services constitutes use of the enclave for naval purposes.[4] That argument overlooks the fact that the Navy

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[4]Petitioners have apparently abandoned one of their central factual arguments made in their unsuccessful Petition to the Virginia Supreme Court, that Wallops Flight Facility may be a cover for the

abandoned the enclave, and that the post-abandonment launches were from sites on Wallops Island—a location where the federal government **never** had exclusive jurisdiction.

In any event, all the facts were before the trial court, the judge considered those facts, and made the factual determination that the federal government did not have exclusive jurisdiction on the enclave. It would be inappropriate for this Court to displace the trial court and become the trier of fact.

C. Petitioners' Argument That Various Agencies Viewed the Federal Government's Jurisdiction as Exclusive Is Wrong.

Petitioners argue that NASA, the National Labor Relations Board ("NLRB"), the Virginia Department of Labor, and an arbitrator were of the view that exclusive jurisdiction lay with the United States. That is not the case. The views of the various agencies concerning the "jurisdictional" status of the Wallops Flight Facility ebbed and flowed over time. Admittedly, the Virginia Department of Labor did argue that the federal government had exclusive jurisdiction, but that was based on a flimsy reed – that the Navy occasionally used the base for aircraft landings in

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CIA or other secret government agency and therefore Virginia would not desire concurrent jurisdiction over the enclave.

training programs and that it was made available in emergency situations. (Exs. N 1-8, O).

The NLRB determination is irrelevant. The decision of the NLRB was not a decision of the Board, but merely a refusal to issue a complaint by one of its regional offices, a determination which is not a decision on the merits. (Ex. T6).

With respect to NASA, the evidence is that for over thirty (30) years, NASA maintained it had only a "proprietary interest" in the land. (Exs. 2, K3, M3, N1, P, R1, R3-4). It was only in a letter to the Virginia Attorney General, dated one day before Petitioner-employer notified Mr. Pusey of his discharge that NASA reversed course. (Ex. U2). Therefore, the position of NASA does not support Petitioners' claim.

Furthermore, the Attorney General of Virginia has consistently maintained that NASA has only a proprietary interest in the land. (Exs. H1, U2).

Additionally, the Petitioner-employer for five (5) years maintained that it could not enforce the union-security agreement because it would violate Virginia law.[5]

Lastly, the "arbitration" involved an "arbitration" in which neither Mr. Pusey nor the employer was a party. The

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[5]In the spring of 1994, Petitioner-employer apparently changed its position after the unions pointed out that the company was protected by the "hold-harmless" clause.

arbitrator, in his decision, held that no court of competent jurisdiction had ever ruled on whether the Virginia Right to Work law applied on the enclave and his determination was conditioned upon the absence of any such ruling. (Ex. S).

Although various agencies made conflicting factual determinations over time, the court below was the only court of competent jurisdiction to examine the question, and it made a ruling based upon the facts of the case. It is neither necessary nor appropriate for this Court to now make factual determinations concerning if and when the Navy had a presence on the enclave.

II. The Court Below Was Correct in Finding That the State of Virginia Had Concurrent Jurisdiction Over the Enclave.

Petitioners argue that this Court should review the unreported fact-finding of the court below. They argue that although the Navy abandoned the post, it was still used at times for naval purposes and, therefore, the federal government maintained exclusive jurisdiction over the enclave. That argument is without merit.

The principle that States may attach conditions to the cession of property and that federal jurisdiction can be exercised for only so long as those conditions are met is well established. *United States v. Johnson*, 994 F.2d 980, 986 (2d Cir.), *cert. denied*, 510 U.S. 959 (1993), *citing S.R.A., Inc. v. Minnesota*, 327 U.S. 558, 564 (1945), *and Fort Leavenworth R.R. v. Lowe*, 114 U.S. 525 (1885); *see*

also United States v. Unzeuta, 281 U.S. 138, 142 (1930) (when the United States acquires land by a state ceding its jurisdiction, the state may impose "conditions which are not inconsistent with the carrying out of the purpose of the acquisition").

As set forth in the Statement of the Case, it is clear that: (1) the federal government owns the four parcels of land that make up the Wallops Flight Facility; (2) during the 1940s, the Commonwealth of Virginia ceded "exclusive" jurisdiction to the federal government (the U.S. Navy) over three of those land parcels (Parcels I, II and III); (3) the Commonwealth's grant of "exclusive" jurisdiction was conditioned upon the federal government's continued ownership of the land and the use of the land for naval purposes; (4) the three parcels of land over which the federal government had "exclusive" jurisdiction ceased to be used for "naval purposes" no later than December 1961 (when the land was formally transferred to NASA); and (5) the federal government never sought or obtained "exclusive" jurisdiction over the fourth parcel (Parcel IV).

Virginia law begins from the presumption that jurisdiction over land which is owned by the United States is concurrent unless it is shown that the United States was deeded the land and accepted exclusive jurisdiction over it. *Smith v. Commonwealth*, 219 Va. 455, 461, 248 S.E.2d 135, 139-40 (1978), *cert. denied*, 441 U.S. 967 (1979); *see also* VA. CODE ANN. § 7.1-21. Further, the General Assembly has established a very specific procedure by which

"additional" jurisdiction is ceded to the United States, VA. CODE ANN. §§ 7.1-21(2) & (4), and that such grants are subject to the limitations contained in the deed of cession. VA. CODE ANN. § 7.1-21(6).

Likewise, this Court held long ago that a State may cede jurisdiction over land contained within its borders with limitations, and that cession without limits is not constitutionally required. This Court stated:

> Assuming that ... we are at liberty to construe the [Washington] statute for ourselves, **we should**, in harmony with our principles of decision in such cases, **give great weight to the views of the state court as to the intent and limitations of the state statute in granting consent and cession**.

Silas Mason Co. v. Tax Comm'n, 302 U.S. 186, 206-07 (1937) (emphasis added; citations omitted).

The undisputed facts in this case establish beyond question that three of the four parcels comprising the Naval Air Station at Chincoteague once were subject to exclusive federal jurisdiction, but the fourth was not. However, the Commonwealth's cession of exclusive jurisdiction over the three parcels specifically was conditioned upon its "use and occup[ation] by the United States for naval purposes," (Ex. A) conditions not met after the Navy conveyed the property to NASA, which has utilized the property as a flight facility.

The lands acquired during World War II— Parcels I, II and III—ceased to be used for "naval purposes" when the U.S. Navy closed its naval air station on June 30, 1959, or at the latest, when it formally transferred the land and facilities to NASA in December 1961. When the lands ceased to be used for naval purposes, the Commonwealth's grant of "exclusive" jurisdiction to the federal government terminated and, by operation of law, reverted to the Commonwealth of Virginia. Since 1962, NASA has listed the jurisdictional status of the Wallops Flight Facility as proprietorial interest only.

Clearly, NASA did not have, or even claim to have "exclusive" jurisdiction over the Wallops Flight Facility, the federal property upon which NASA subsequently launched missiles. NASA did not "use and occupy the land for naval purposes," as required by the 1940 grant of exclusive jurisdiction. "Exclusive" federal jurisdiction ceased long before Mr. Pusey was terminated or even became employed on the facilities. The Navy's subsequent entry as a tenant, twenty-seven (27) years after the fact on other parcels of land, did not restore the federal government's jurisdiction over Parcels I, II, and III. The occupation of the actual Island by the Navy did not in any way magically recreate a jurisdictional claim that was abandoned years earlier, or create a new claim of jurisdiction exclusively over land which the federal government never had exclusive jurisdiction (Parcel IV and the Island). Accordingly, Mr. Pusey was protected by the Commonwealth's Right to Work law,

and his termination for refusing to comply with the unions' demands was unlawful.

As recognized by the court below, the federal government had exclusive jurisdiction over Parcels I, II and III, but lost "exclusive" jurisdiction over them in December 1961, when the Navy abandoned its base and turned it over to NASA. The federal government never had jurisdiction over Parcel IV or the Island. Nothing subsequently done by the federal government restored the abandoned exclusive jurisdiction. Therefore, the unreported decision of the court below was correct and should not be reviewed by this Court.

CONCLUSION

This case involves no split in the circuits, no conflict with any appellate courts, and no conflict with any decisions of this Court. The issues raised in the Petition are primarily factual questions that this Court should not review. The Petition should be denied.

Respectfully submitted,

JOHN C. SCULLY*
National Right to Work Legal
Defense Foundation, Inc.
8001 Braddock Road
Springfield, VA 22160
(703) 321-8510

DANIEL HARTNETT
Ayres & Hartnett, P.C.
Court Green
Accomac, VA 23301
(757) 787-1341

ATTORNEYS FOR RESPONDENT
**Counsel of Record*

March 2001

APPENDIX A

Memorandum Opinion and Order of the United States District Court for the Eastern District of Virginia

April 25, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

[date stamp omitted in printing]

FREDERICK A. PUSEY,

Plaintiff,

v. **CIVIL ACTION NO. 2:95cv134**

H & H CONSOLIDATED, INC., LOCAL LODGE 2552, INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, and DISTRICT LODGE 74, INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS,

Defendants.

MEMORANDUM OPINION AND ORDER

Pending before the Court is the plaintiff's motion to remand the suit to state court. The defendants have filed memoranda in opposition to the plaintiff's motion, and the plaintiff has filed a reply brief. The Court conducted a hearing on the matter on April 24, 1995.

I. FACTUAL AND PROCEDURAL HISTORY

Plaintiff Frederick A. Pusey ("Pusey") is a citizen of the state of Maryland. Defendant H & H Consolidation, Inc. ("H & H") is a foreign corporation transacting business in Virginia and is registered with the Virginia Corporation Commission. Defendants International Association of Machinists & Aerospace Workers Local Lodge 2552 ("Local 2552") and International Association of Machinists & Aerospace Workers District Lodge 74 ("District 74") are unincorporated associations organized for the purpose of acting as a labor organization and serve as the bargaining agent for the employees of H & H at the Wallops Island Flight Facility, Wallops Island, Virginia.

The Plaintiff began working for H & H as an electronic technician in January 1987 at H & H's facilities on Wallops Island. The National Aeronautics and Space Administration ("NASA") operates a facility on Wallops Island, and H & H contracts with NASA to provide technical support. On January 1, 1994, H & H entered into a collective bargaining agreement ("the agreement") with Local 2552 and District 74. The agreement contains a union security agreement,[1] whereby H & H agreed to

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[1]The plaintiff in his complaint characterizes the agreement as a "checkoff" provision. A checkoff provision authorizes an employer to deduct union membership dues directly from an employee's wages and remit them to the union. See 29 U.S.C. § 186(c) (4) (stating that statutory language prohibiting payments by an employer to a bargaining unit "shall not be applicable . . . with respect to money

require all present and future employees to join as members of the union or pay a monetary sum equivalent to union dues. Failure of an employee to meet the terms of the security agreement requires H & H to dismiss the employee from his employment. The agreement section states:

> All present employees who are members of the Union on the effective date of this Agreement shall remain members of the Union in good standing or pay an amount equivalent to the Union Dues. Present employees who are not members of the Union and/or employees who are hired hereafter, shall become and remain members in good standing in the Union or pay an amount equivalent to the Union dues on and after the 31st day following the effective date of this Agreement, whichever is the latter. This money is to pay the Union's cost of representing employees for the purpose of collective bargaining and this authorization is not conditioned on present or future membership in the Union.[2]

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deducted from the wages of employees in payment of membership dues in a labor organization").

[2]Complaint Ex. A (Collective Bargaining Agreement section VI).

On May 2, 1994, Local 2552 sent the plaintiff a letter stating that pursuant to the collective bargaining agreement, the plaintiff was required to join the union and pay its dues or "pay a service fee as a condition of employment."[3] The letter further stated that failure to comply with the union security agreement would result in the union's request to H & H that the plaintiff be terminated from his position.[4] The plaintiff did not comply with the terms of the union security provision of the collective bargaining agreement, and on May 13, 1994, H & H notified the plaintiff by letter that his employment with H & H would be terminated as of May 16, 1994 due to his failure to join the union or pay an amount equivalent to union membership dues.[5]

On January 17, 1995, the plaintiff filed a motion for judgment in Accomac County, Virginia Circuit Court against defendants H & H, Local 2552 and District 74. In his motion, the plaintiff alleges that H & H terminated him from his position in violation of the Virginia right-to-work statute. See Va. Code Ann. §§ 40.1-58 to - 69 (Michie 1994). In Count One of his motion the plaintiff states that the union security provision of the collective bargaining agreement violates public policy as stated in the Virginia

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[3]See Complaint Ex. B.

[4]Id. H & H sent the plaintiff a letter on May 3, 1994 setting forth a similar request pursuant to the agreement See Complaint Ex. C.

[5]Complaint Ex. D.

right-to-work statute based on its requirement that the plaintiff must support the union. The plaintiff further alleges that the provision violates the statute's prohibition against agreements between employers and unions that deny non-union member employees the right to work unless the employee pays a fee. See id. § 40.1-59. The plaintiff requests damages from the defendants in the amount of $300,000, including attorney's fees.

On February 8, 1995, defendant H & H filed a petition for removal in this Court pursuant to 28 U.S.C. § 1404. Defendant H & H alleged that removal was proper under 28 U.S.C. § 1331 based on the plaintiff's request that the Court interpret the collective bargaining agreement. On February 9, 1995, defendants Local 2552 and District 74 filed a notice of removal in this Court, alleging the same jurisdictional bases as those asserted by defendant H & H. On February 9, 1995, defendant H & H filed its answer and affirmative defenses, and on February 16, 1995, defendants Local 2552 and District 74 filed their answer and affirmative defenses.

On March 3, 1995, the plaintiff filed a motion and supporting brief to remand the action to state court. In its supporting brief the plaintiff argues that the Court lacks both diversity and federal question jurisdiction over the present action. The plaintiff states that the action concerns a violation of the state right-to-work statute and that such a violation would be properly addressed by a state court.

On March 17, 1995, defendants Local 2552 and District 74 filed a memorandum in opposition to the plaintiff's motion to remand. The defendants argue that the plaintiff has alleged a violation of the collective bargaining agreement which grants the Court jurisdiction to hear the action. The defendants also argue that jurisdiction is proper based on the nature of the Wallops Island Facility. The defendants assert that the facility is on federal property, and Virginia courts may not exercise their jurisdiction over the facility. On March 17, 1995, defendant H & H filed a memorandum in opposition to the plaintiff's motion to remand. The defendant argues that jurisdiction by the Court is proper because the Wallops Island facility is a federal enclave outside the jurisdictional authority of Virginia, and the state right-to-work statute does not apply to the parties' collective bargaining agreement.

II. STANDARD OF REVIEW

Where a party brings an action in state court over which a federal district court would have original jurisdiction, the action "may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending." 28 U.S.C. § 1441(a). The United States Court of Appeals for the Fourth Circuit has stated that "[t]o be removable to federal court under 28 U.S.C. § 1441 a state action must be within the original jurisdiction of the court, and its jurisdiction must be ascertainable from the face of the complaint." Hunter Douglas Inc. v. Sheet Metal

Workers Int'l Ass'n Local 159, 714 F.2d 342, 345 (4th Cir. 1983). However, if a district court finds that it lacks subject matter jurisdiction over the action, it may remand the suit back to state court. 28 U.S.C. § 1447(c); see also Cook v. Georgetown Steel Corp., 770 F.2d 1272, 1276 (4th Cir. 1985).

III. ANALYSIS

In the present action the plaintiff has alleged that the union security agreement violates the Virginia right-to-work statute. Virginia has enacted a right-to-work statute that ensures that an individual is not denied the right of employment based upon a requirement of membership in a union. Va. Code Ann. §§ 40.1-58 to -69 (Michie 1994). The statute states:

> Any agreement or combination between any employer and any labor union or labor organization whereby persons not members of such union or organization shall be denied the right to work for the employer, or whereby such membership is made a condition of employment or continuation of employment by such employer, or whereby any such union or organization acquires an employment monopoly in any enterprise, is hereby declared to be against public policy and an illegal combination or conspiracy.

Id. § 40.1-59. The statute further states that "[n]o person shall be required by an employer to become or remain a member of any labor union or labor organization as a condition of employment or continuation of employment by such employer." Id. § 40.1-60. The statute also prohibits the requirement that an employee who is not a member of a union pay union dues. Id. § 40.1-62.

NASA operates the Wallops Island facility at which the plaintiff worked prior to his termination. The defendants contend that the facility is under the jurisdiction of the federal government and removal was proper based on the Court's original jurisdiction over the action. The plaintiff counters that he seeks to redress a violation of the state right-to-work statute and has not pleaded a violation of a federal right in his complaint. Both parties have submitted evidence regarding the status of Wallops Island as an enclave of the federal government.

The United States Constitution empowers the federal government to purchase property for use by the government. U.S. Const. art. 1, § 8, cl. 17. The purchase of land, however, does not grant the federal government exclusive jurisdiction over the property. United States v. State Tax Comm'n, 412 U.S. 363, 372 (1973); Waltrip v. Virginia, 189 Va. 365, 369, 53 S.E.2d 14, 16 (1949). To obtain exclusive jurisdiction, the head of a federal department or agency must "accept or secure from the State in which any lands or interests . . . are situated, consent to or cession of such jurisdiction, exclusive or partial, not theretofore

obtained, over any such lands or interests as he may deem desirable and indicate acceptance . . . by filing a notice of such acceptance with the Governor of such State or in such manner as may be prescribed by the laws of the State where such lands are situated." 40 U.S.C § 255.

Virginia has prescribed the method by which the federal government may obtain jurisdiction from the state:

> Whenever the head or other authorized officer of any department or independent establishment or agency of the United States shall deem it desirable that additional jurisdiction or powers be ceded over any lands in Virginia acquired or proposed to be acquired by the United States under his immediate jurisdiction, custody or control, and whenever the Governor and Attorney General of Virginia shall agree to the same, the Governor and Attorney General shall execute and acknowledge a deed in the name of and under the lesser seal of the Commonwealth ceding such additional jurisdiction. . . .

Va. Code Ann. § 7.1-21(2) (Michie 1993). The Virginia statute further requires that "[n]o such deed shall become effective or operative until the jurisdiction therein provided for is accepted on behalf of the United States as required by [40 U.S.C. § 255]." Va. Code Ann. § 7.1-21(3). Once the federal government has acted to obtain jurisdiction over the

property, the Virginia statute provides for the reversion of jurisdiction to Virginia:

> If the United States shall cease to be the owner of any lands, or any part thereof, granted or conveyed to it by the Commonwealth; if the purposes of any such grant or conveyance to the United States shall cease; or if the United States shall for five consecutive years fail to use any such land for the purposes of the grant or conveyance, then, and in that event, the right and title to such land, or such part thereof, shall immediately revert to the Commonwealth . . . .

Id. § 7.1-22.B.

The Court FINDS that there exists a genuine issue of material fact as to whether the federal government affirmatively acted to obtain exclusive jurisdiction over Wallops Island and, if it did, whether it currently retains its jurisdiction. On February 7, 1940, the Virginia General Assembly approved an act ceding exclusive jurisdiction to the federal government over several parcels of land, including the Wallops Island area. 1940 Va. Acts 14. The act conditions the cession of exclusive jurisdiction on the stipulation that "the jurisdiction hereby ceded shall continue no longer than the United States shall own such lands in fee simple and they shall be used and occupied by the United States for naval purposes." Id. Defendants Local 2552 and District

74 submitted copies of letters dated May 5, 1943 and August 30, 1949 from the Secretary of the Navy to the Governor of Virginia purporting to accept exclusive jurisdiction over three parcels on Wallops Island for use by the United States Navy.[6] The three letters are signed by the governor. The defendants have also provided a copy of a letter dated September 10, 1990 from the Commissioner of the Virginia Department of Labor and Industry setting forth the department's finding that the federal government continued to exercise exclusive jurisdiction over Wallops Island.[7] The Commissioner states that she weighed particular factors in making the conclusion: "official action taken to establish and/or relinquish jurisdiction; the way in which the facility operated and presented itself in terms of jurisdiction; and finally, the way in which the facility was perceived and treated by other units of government."[8] The Commissioner considered the three letters by the Secretary of the Navy as well as the failure of the federal government to provide Virginia with notice of the cessation of the exercise of jurisdiction. The plaintiff has submitted a letter dated September 16, 1994 from the Office of the Attorney General of Virginia stating that in the view of the author of the letter, a deputy attorney general, the United States no

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[6]See Defendants Local 2552 and District 74's Memorandum in Support Ex. 3.

[7]See Defendant H & H's Memorandum in Support Ex. A.

[8]Id.

longer exercises exclusive jurisdiction over Wallops Island. The author cites the fact that the United States Navy had ceased to use the island for naval purposes, allowing NASA to maintain its facility on the island.

The Virginia Supreme Court has held that Virginia retains jurisdiction over land owned by the federal government unless it is demonstrated that the United States was deeded the land and acted affirmatively to accept jurisdiction. Smith v. Virginia, 219 Va. 455, 461, 248 S.E.2d 135, 139 (1978), cert. denied, 441 U.S. 967 (1979). The United States must act in the manner prescribed in the Virginia statute regarding cession of jurisdiction in order to exercise exclusive jurisdiction. Waltrip, 189 Va. at 369, 53 S.E.2d at 16. The Virginia Supreme Court has stated:

> The question whether a Federal area within a State is subject to exclusive jurisdiction is complicated and often difficult to decide. A determination depends upon many factors, jurisdiction being subject to the terms, conditions, restrictions, limitations and provisions of the acquisition of the United States, including the consent of the State, and acceptance by the United States.

Western Union Tel. Co. v. Virginia ex rel. State Corp. Comm'n, 204 Va. 421, 426, 132 S.E.2d 407, 411 (1963).

It is a well-accepted principle that federal courts are courts of limited jurisdiction. Owen Equip. & Erection Co.

v. Kroger, 437 U.S. 365, 374 (1978). The burden rests with the party seeking the jurisdiction of the court to demonstrate that the court has original jurisdiction over the action. McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 182 (1936). In the present action, the defendants have removed the case to this Court on the assertion that the Court has federal question jurisdiction pursuant to 28 U.S.C. § 1331. The defendants argue that the status of the Wallops Island facility as a federal enclave allows the Court to exercise its jurisdiction. However, it remains unclear whether the United States acted in accordance with the statutory authority to assume exclusive jurisdiction over the facility. If the United States did comply to obtain exclusive jurisdiction, there exists an additional question as to whether exclusive jurisdiction over Wallops Island reverted to Virginia through any statutory compliance by the United States or the use of the facility by NASA. Accordingly, the Court FINDS that the defendants have failed to demonstrate the existence of original jurisdiction by the Court over the present action. The Court ORDERS that the action be REMANDED to state court in accordance with 28 U.S.C. § 1447(c).[9]

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[9]The defendants have alleged that jurisdiction is proper pursuant to section 301 of the Labor Management Relations Act, 29 U.S.C. § 141 et seq., based on the plaintiff's allegation that he was terminated in violation of the collective bargaining agreement. The defendants argue that the plaintiff has purposefully avoided seeking to raise a federal claim in his complaint and urge the Court to look beyond the face of the pleadings. The Court FINDS that the

IV. CONCLUSION

The Court **FINDS** that defendants H & H Consolidated, Inc., International Association of Machinists & Aerospace Workers Local Lodge 2552, and International Association of Machinists & Aerospace Workers District Lodge 74 have failed to demonstrate that the Court has jurisdiction over the action. The Court **ORDERS** that the action be **REMANDED** to Accomac County, Virginia Circuit Court pursuant to 28 U.S.C. § 1447(c).

The Clerk is **REQUESTED** to mail a copy of this Order to all counsel of record.

It is so **ORDERED.**

/s/

United States District Judge

Norfolk, Virginia

April 25, 1995

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defendants' allegations that the plaintiff has claimed breach of the agreement does not create a basis for an exercise of the Court's jurisdiction under section 301. See Hunter Douglas, 714 F.2d at 345 (stating that to allow removal, "jurisdiction must be ascertainable from the face of the complaint"). The plaintiff alleges in his complaint that the defendants have acted in violation of the Virginia right-to-work statute, and the Court DECLINES to FIND that the plaintiff has placed the collective bargaining agreement at issue.

Supreme Court, U.S.
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No. 00-1254

IN THE

Supreme Court of the United States

LOCAL LODGE 2552, INTERNATIONAL ASSOCIATION OF MACHINISTS and AEROSPACE WORKERS, DISTRICT LODGE 74, INTERNATIONAL ASSOCIATION OF MACHINISTS and AEROSPACE WORKERS, and H & H CONSOLIDATED, INC.,
Petitioners,

v.

FREDERICK A. PUSEY,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Virginia

REPLY BRIEF FOR PETITIONERS

THOMAS LUCAS
McGUIREWOODS
9000 World Trade Center
101 West Main Street
Norfolk, VA 23510

JEREMIAH A. COLLINS
Counsel of Record
MARGO PAVE
BREDHOFF & KAISER, P.L.L.C.
805 15th Street, N.W.
Suite 1000
Washington, DC 20005
(202) 842-2600

JAMES J. VERGARA, JR.
VERGARA & ASSOCIATES
100 Main Street Plaza
Hopewell, VA 23860

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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ARGUMENT

In his Brief in Opposition, Respondent Pusey concedes that from the 1940's through the present day, the United States has owned the three parcels of land at Wallops Flight Facility ("WFF") that are at issue here, *see* Opp. at 18, and that the facility has at all times been occupied and operated by federal agencies, *id.* at 3. Pusey concedes as well that when the federal government acquired the property, it obtained and exercised exclusive jurisdiction over all activities conducted on it. *Id.* at 1-2.

But Pusey endorses the position of the Virginia court below that, solely because of the manner in which the United States has chosen to make use of this federal enclave, the federal government has been ousted of its exclusive jurisdiction, such that Virginia now may assert the power to determine as a matter of state labor policy whether contractors performing services for the United States at WFF should be prohibited from requiring that their employees pay an agency fee to the union that represents them.

According to respondent, this question—*viz.*, whether the power to regulate labor relations at this federal enclave rests exclusively with the federal government or must be shared with Virginia—presents only a question of fact, which the Virginia courts resolved by "finding" that jurisdiction "reverted" to the State when, in 1961, the Navy transferred custody of WFF to NASA. *Id.* at 17, 18, 20, 21.

Like the courts below, Pusey bases that conclusion on language in the statute by which Virginia ceded jurisdiction over these lands, which provides "that the jurisdiction hereby ceded shall continue no longer than the United States shall own such lands in fee simple and they shall be used and occupied by the United States for naval purposes." 1940 Virginia Acts of Assembly, ch. 14. Equating "use[] . . . for naval purposes" with "use by the Navy," Opp. at 13,

respondent declares that this case turns on nothing more than "factual determinations concerning if and when the Navy had a presence on the enclave," *id.* at 17. Because the tenant of the property from 1961 on was NASA—although Pusey concedes that Navy personnel continued to make periodic use of the facilities, *see id.* at 4-5—respondent defends the "factual determination" of the courts below that the requisite "presence" of the Navy was lacking. *Id.* at 14-21.

That analysis, however, rests on two assumptions: first, that the reference in the cession statute to "naval purposes" must be understood as confined to activities *conducted by the United States Navy*; and second, that the language must be confined to activities conducted *regularly*, rather than "occasionally," Opp. at 4, by the Navy. Only by construing the statute as imposing those two limitations can Pusey deem it immaterial (i) that much of NASA's work at WFF has been for the same general aviation-related purposes as the Navy's prior use of the facility—indeed, much of NASA's work has been undertaken directly *for the Navy*, *see* Petition for a Writ of Certiorari ("Petition") at 3-4—and (ii) that personnel of the Navy itself have continued to make periodic use of the facility, *see* Opp. at 4.

Neither Pusey nor the court below has offered any explanation as to why the cession statute should be read as containing the two restrictions on which the decision below necessarily rests; and the statutory language certainly does not compel such a narrow construction. That being so, respondent's argument respecting the authority of state courts to make so-called "findings" as to whether jurisdiction over activities on a federal enclave has "reverted" to the state amounts here to a claim that each state court may, according to its own lights, decide whether the federal government's evolving use of a particular enclave should be considered to have extended beyond the metes and bounds of the purposes, *however ambiguously defined*, for which jurisdiction

originally was ceded. On respondent's view, a state court then is free to declare that the State may proceed to exercise regulatory authority over a domain as to which federal legislative authority previously was exclusive.

Such an approach would leave private parties, as well as state, local and federal authorities, with no way of knowing what laws apply on a federal enclave. Indeed, in this case, not only the petitioners, but also NASA, the National Labor Relations Board, the Virginia Department of Labor and Industry, and the local law enforcement agencies all understood that federal jurisdiction over WFF was exclusive, such that Virginia's "right to work" statute could not be applied to federal contractors on the enclave. *See* Pet. at 4-5, 15.

Respondent's conception of the binding force of state court "findings" treats the question here as if it were one of private property law, rather than what it is – a question of the scope of exclusive federal legislative authority under the Enclave Clause (Article I, § 8, cl. 17) of the Constitution. Respondent, like the Virginia court, ignores the teaching of this Court, *see Humble Pipe Line Co. v. Waggonner*, 376 U.S. 369 (1964), and of other federal courts, *see United States v. Johnson*, 994 F.2d 980 (2d Cir. 1993), that courts should not be quick to conclude that the federal government's evolving use of a federal enclave has divested the United States of exclusive jurisdiction—especially where, as here, the federal government has not acted to relinquish its exclusive jurisdiction,[1] but insists that it still possesses, and wishes to assert, such jurisdiction[2].

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[1] The Virginia Code establishes a specific method by which the United States may relinquish exclusive jurisdiction over an enclave. The United States did not relinquish its exclusive jurisdiction over WFF through that procedure, or in any other way. *See* Pet. at 4.

[2] *See* Ex. U1 (NASA's 1994 letter to the Virginia Attorney General stating that "NASA has concluded that the Federal Government, as

In the end, respondent's effort to portray this case as involving nothing but a fact dispute is simply a backhanded way of asserting that there are no governing standards or principles of construction that must be observed in making a determination as to whether the United States has forfeited its exclusive jurisdiction over a federal enclave. *Humble Pipe Line* and other cases indicate otherwise. *See* Pet. at 14-18.[3] Certiorari should be granted to correct the Virginia court's improper encroachment on the exclusive federal jurisdiction that properly applies in this case, and to provide needed guidance to the lower courts respecting the analysis to be followed when it is claimed that the exclusive jurisdiction exercised by the United States over a federal enclave has been divested by virtue of the government's changing use of its property.

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represented by NASA, has exclusive Federal jurisdiction over parcels 1 through 3"). Respondent notes that some doubts were expressed by NASA on this subject before the question of exclusive jurisdiction came to a head. *See* Opp. at 15-16. But when it became necessary for NASA to reach a firm conclusion on the matter, NASA concluded in no uncertain terms that the United States retains exclusive jurisdiction.

[3] Petitioner attempts to distinguish *Humble Pipe Line* on the ground that this case, unlike that one, involves "the total abandonment of the entire enclave." Opp. at 12. Respondent's attempted distinction is specious. The United States never "abandoned" WFF; it simply transferred custody from one federal instrumentality (the Navy) to another (NASA).

CONCLUSION

For the foregoing reasons and those stated in the Petition, the Petition for Certiorari should be granted.

Respectfully submitted,

THOMAS LUCAS
MCGUIREWOODS
9000 World Trade Center
101 West Main Street
Norfolk, VA 23510

JEREMIAH A. COLLINS
Counsel of Record
MARGO PAVE
BREDHOFF & KAISER, P.L.L.C.
805 15th Street, N.W.
Suite 1000
Washington, DC 20005
(202) 842-2600

JAMES J. VERGARA, JR.
VERGARA & ASSOCIATES
100 Main Street Plaza
Hopewell, VA 23860